DOCUMENT RESUME

ED 150 487 CG 012 154

AUTHOR Galvin, John J.; And Others
TITLE Instead of Jail: Pre- and Post-Trial Alternatives to Jail Incarceration. Volume 3, Alternatives to Prosecution.
SPONS AGENCY National Inst. of Law Enforcement and Criminal Justice (Dept. of Justice/LEAA), Washington, D.C.
PUB DATE Oct 77
GRANT 75-NI-99-0006
NOTE 100p.; For related document see CG 012 153
AVAILABLE FROM Superintendent of Documents, U.S. Government Printing Office, (Washington, D.C., 20402 (no. 027-000-00571-3)

EDRS PRICE MF-$0.83 HC-$4.67 Plus Postage.
DESCRIPTORS *Crime; *Criminology; *Justice; *Law Enforcement; Lawyers; Policy Formation; Program Descriptions; *Program Development; Social Problems
IDENTIFIERS *Prosecution Alternatives

ABSTRACT

The third volume in a series of publications on alternatives to jail incarceration, this booklet deals specifically with alternatives to prosecution. Its focus is the diversion of defendants and prospective defendants from the criminal justice system. Chapter One deals with the policy issues of diversion; Chapter Two with planning diversion programs; and Chapter Three with diversion categories and program variations. Advocates of diversion believe that there are more effective ways than use of criminal sanctions to turn many people away from criminal careers. They also cite its benefits in reducing the high court workloads in many jurisdictions. (Author/BP)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

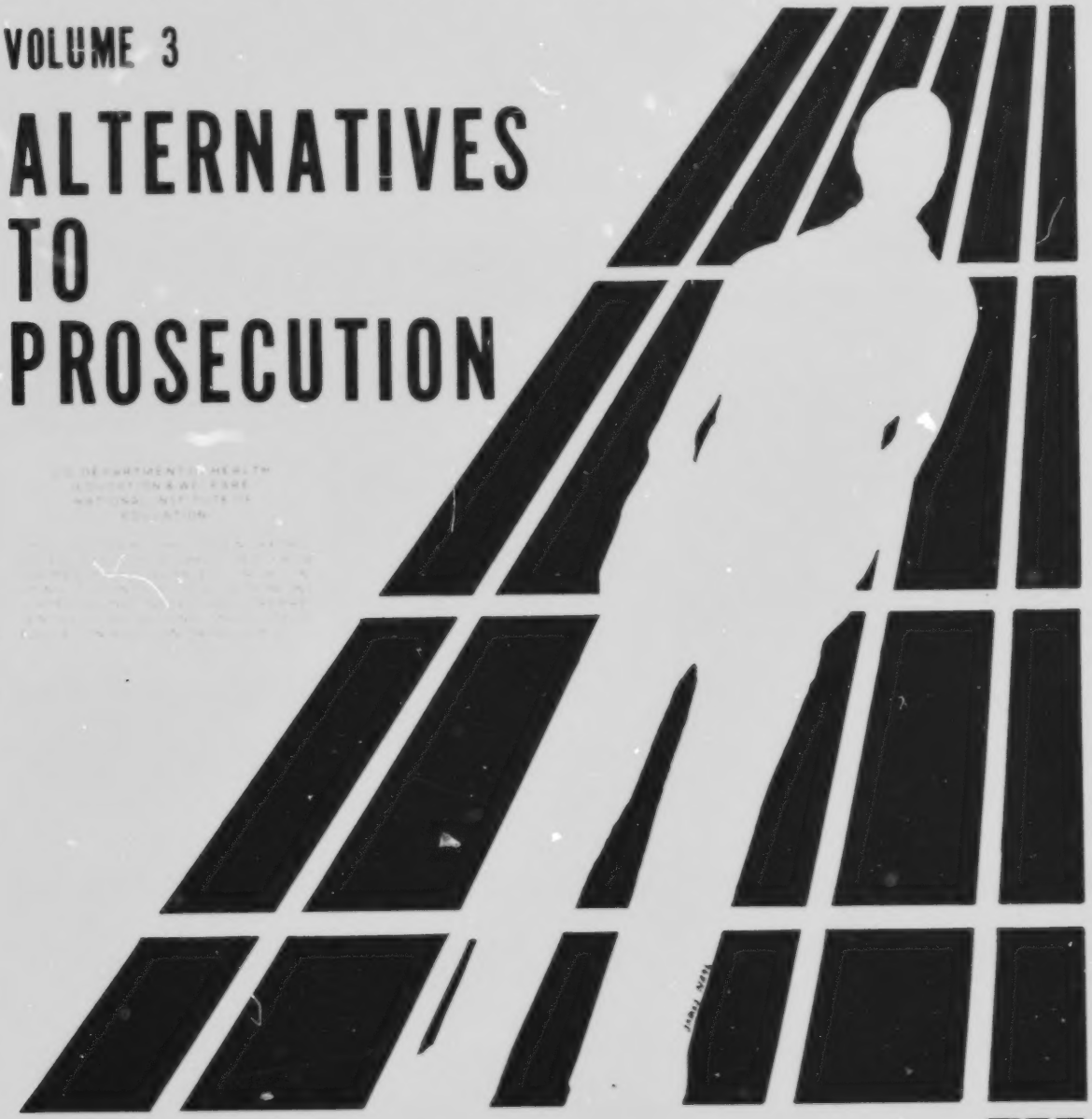
ED150487

INSTEAD OF JAIL

pre-and post-trial alternatives to jail incarceration

VOLUME 3

ALTERNATIVES TO PROSECUTION



CG 012154

National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
United States Department of Justice

INSTEAD OF JAIL:

pre-and post-trial alternatives to jail incarceration

VOLUME 3

ALTERNATIVES TO PROSECUTION

JOHN J. GALVIN, PROJECT DIRECTOR
WALTER H. BUSHER, ASSOCIATE DIRECTOR
WILLIAM GREENE - QUIJANO
GARY KEMP
NORA HARLOW
KATHLEEN HOFFMAN

This project was supported by Grant Number 75-NI-99-0006 awarded to the University City Science Center, Washington, D.C. by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

OCTOBER 1977

National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
U.S. Department of Justice

NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE

Blair G. Ewing, Acting Director

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

James M.H. Gregg, Acting Administrator

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

Stock No. 027-000-00571-3

TABLE OF CONTENTS

		Page
I.	Diversion: policy issues	1
	Rationales for diversion	1
	Some pros and cons	3
	Diversion policy issues	11
	Recap	16
	Recommended standards - NAPSA	19
II.	Planning diversion programs	27
	Patterns of diversion	27
	Levels of intervention	29
	Administrative arrangements	31
	Planning considerations	37
	Categories of prospective divertees	39
	Possible caseloads	40
	Program evaluation	45
	Diversion and jail population	47
III.	Diversion categories and program variations	49
	Citizen dispute settlement	49
	Public inebriate	52
	Drunk drivers	55
	Vocationally disadvantaged	57
	Less specialized programs	63
	Drug diversion	75
	Program development	83
Chapter Notes		85

LIST OF FIGURES

		Page
Figure 1.	Intervention modes	29
Figure 2.	Administrative arrangements	33
Figure 3.	Diversion prospect categories	40
Figure 4.	Potential caseloads	42

CHAPTER I

DIVERSION: POLICY ISSUES

Diversion of defendants and prospective defendants from the criminal justice system offers possibilities for reduction in pre- and post-trial confinement capacity requirements - the focal issue of this project. Based on the experience of many contemporary diversion programs, the impact might not be great. In these jurisdictions most "divertees" have already gained pretrial release when selected for a program; or they would have been granted this in the absence of a diversion program. Moreover, few of them, if prosecuted and convicted, would have been sentenced to prison or jail. There are opportunities, however, for significant reduction in jail use through the diversion process, as will be developed in Chapter II.

Advocates of diversion are not, generally speaking, concerned so much with jail population as with the well-being and future prospects of various classes of criminal suspects or defendants. It also is based on a belief that there are more effective ways than application of criminal sanctions to turn many people away from criminal careers. Another argument for diversion is its benefits in reducing impossibly high court workloads in many jurisdictions.

Rationales for Diversion

Arguments for the practice of diversion range widely - varying at times with defendant category or type of diversion program in question. There are four general considerations often urged. Simply stated, they go like this:

1. The experience of criminal justice processing for a defendant, associated with the stigma this confers, rather than deterring him from further crime, can act, in effect, as an inducement. The

liabilities of a criminal record restrict his vocational and social opportunities. They make him a more likely target of subsequent arrests and convictions. This and the victim's conviction/punishment experience lower his self-esteem and confidence. His acquaintanceship with chronic offenders and criminal behavior patterns may be enlarged as a result of time spent in jail, prison, or "reform school." He becomes more vulnerable than before to occasions for crime. This critical view of the effects of criminal justice processes on defendants is reinforced by growing literature which argues that correctional rehabilitation programs, on balance, do not prevent recidivism.[1]

2. Criminal justice processing becomes increasingly expensive at each succeeding stage and level of sanction employed. The more costly procedures and sanctions should be reserved for very serious cases or chronic offenders charged with comparatively serious crimes. In many jurisdictions court systems have become overloaded - jails and prisons overcrowded. Diversion offers a means of cutting back or at least containing these burdens, while assuring use of more drastic and more expensive methods where they are most needed.

3. Criminal justice is not the appropriate system to deal with many people who, by tradition, are brought under its control. Such groups are variously defined, but they have in common some problem which "points" them toward crime and which is believed to be amenable to methods which are either not available or work less well within criminal justice than within civil law, health, education, or other areas of human service.

4. Criminal laws and criminal law enforcement bear unevenly on the least advantaged or most problem-ridden elements of society - the poor, racial and ethnic minorities, the young, the uneducated, the chronically unemployed. The ethical improprieties, social deviations, and even criminal behavior of the more affluent and politically powerful are less subject to public intervention and penal sanctions. Diversion programs can be designed to reduce such institutionalized discrimination.[2]

Some Pros and Cons

The National Advisory Commission on Criminal Justice Standards and Goals devoted chapters in its reports on Corrections and on Courts to the subject of diversion in which it reviewed measures from decriminalization to pretrial diversion with reference both to adults and juveniles. The Commission urged the adoption of formal diversion programs and proposed factors to consider in selection of candidates and procedures to be followed.[3] Literature on pretrial diversion has expanded since the Commission's reviews were conducted. Recent reports point up issues of ethics and law as well as of the interpretation of facts, at times beyond those considered by the Commission. The thrust of much of this writing is one of caution and, in some instances, skepticism toward pretrial diversion as exemplified in some programs.

Some critics would eliminate formal diversion programs: (1) because of potential hazards to defendants who either might not have been prosecuted in the absence of such a program or, if prosecuted, might have been acquitted; (2) because such programs drain resources from already impoverished agencies, such as probation, for convicted offenders. Others do not reject diversion

but urge emphasis on alternative possibilities and caution in the implementation of diversion. A brief summary of these viewpoints and proposals is provided below.

1. For certain kinds of offenses, decriminalization is a more practical course than continued use of arrest followed by widespread use of diversion. Examples of such offenses would be public intoxication and possession of drugs for personal use.

Drug Possession. In California, during 1974, half of all persons incurring prosecutor charges for felony marihuana offenses were diverted under provisions of Penal Code Section 1000. It is probable that at least three fourths of those charged with possessing small quantities - and not having a prior criminal record - were diverted.

Among those diverted almost nine out of ten gained dismissal of charges after an average of about seven months in diversion status. Many hundreds of dollars were spent, per case, to make arrests, screen and evaluate cases, make selections, provide supervision and services, and take final action. There is little evidence to prove that the supervision and services were essential to success in most cases, or that case selection might not have been done more simply and at less cost.

If a law has so little popular support as the above figures reflect, there is a real question as to the wisdom of keeping the law on the books and spending large amounts of tax money, first to arrest then, in most cases, divert violators. (For more detail and references on California's PC 1000 diversion program, see Chapter III.)

Public Inebriation. In a number of communities today, where public intoxication is still a criminal offense, half or more of persons taken into custody by police are taken to alcohol detox centers - and half or more of the

balance are released from jail in a matter of hours. Comparatively few persons are prosecuted, and many of these receive, as a final disposition, a suspended sentence or "bench probation."

Again, the question arises as to whether the criminal law and the criminal justice system should be involved at all in the matter of public inebriation.

These examples point up a key issue in the area of diversion policy planning. The alternatives may not be just diversion versus full prosecution. In respect to some kinds of behavior, there is the additional possibility of decriminalization.

Limitations of Decriminalization. This project did not undertake a study of decriminalization. Enough was learned, however, to permit the comment that the route of decriminalization is tortuous and strewn with obstacles that can diminish anticipated effects or give rise to developments which may not have been foreseen.

As to public intoxication, for example, this is a community problem that cannot be simply ignored. Some publicly funded arrangements for emergency transportation and care are needed, at least for the indigent homeless alcoholic lying on the sidewalk in a stupor and possibly courting death. By the same token, both merchants and their customers will not long tolerate the undeterred presence of large numbers of drunken and at times troublesome persons in downtown areas of a community (where public inebriates tend to cluster).

Decriminalization of public drunkenness, while removing this challenge from the criminal justice system, leaves a social problem which still must be addressed with legislation and with public resources. (See Chapter III for further discussion.)

As to the other example - possession of marihuana, typically, what has been called decriminalization has not really been that. Several states have

passed "decriminalization" laws in this area, but these simply reduce the sanctions by eliminating jail or prison sentences as a penalty and substituting use of citation instead of arrest and detention for alleged violators. Court processing may be largely eliminated by providing that persons cited can, in effect, admit guilt and pay a fine without formal proceedings.

When such a law became effective in California, January 1, 1976, a number of persons cited continued to become involved in the P.C. 1000 diversion program. Accepting diversion permits the defendant to avoid paying the fine (up to $100). Some evidently are willing to undergo supervision and service programs at least partly for this reason, along with avoiding even a petty conviction.

These points are not made as arguments against the concept of decriminalization. We have long overreached ourselves in the way of attempting to use criminal law to attack all manner of conditions perceived as social problems. Orderly withdrawal from some such "crime fronts" seems called for. But changes of this order in our social system call for very careful thought and study. While rhetoric may be useful, indeed essential, to generating the pre-conditions for change, it is unlikely, of itself, to produce effective legislation.

In the mean time, diversion programs offer a means of testing and demonstrating the feasibility and implications of decriminalization. Eliminating a provision of a state's criminal code can be a difficult and drawn-out process. Pending results of efforts to this end - and possibly aiding them - a diversion program may represent a useful expedient.

2. There are ways other than through pretrial diversion to address many of the problems which have occasioned the spread of this practice, for example:

- Various strategies and procedures for speeding up court processing;
- Effective measures to expunge criminal conviction records, where specified conditions are met - and the spread of policies forbidding discrimination against persons solely on the basis of an arrest record;
- Development and more extensive use of pre-arrest diversion practices and programs such as crisis resolution by police, procedures to encourage and monitor voluntary restitution, citizens dispute settlement programs;
- Integrated and improved pretrial release and detention services, including early initiation of needed treatment or training services on a voluntary basis or as a condition of pretrial release;
- Expansion and enrichment of probation programs and increased use of these.

Coverage is given in this publication to some of these recommended practices, including especially pretrial release and, more briefly, citizen dispute settlement programs. In a companion publication, Sentencing the Misdemeanant, attention is given to a wide variety of alternative sentencing options and to the roles and functions of probation.

3. Pretrial diversion should not be used -
   - In situations where, lacking a diversion program, prosecution would not have been pursued;
   - In situations where the defendant has not given his knowledgeable consent after consulting with counsel;

- As a plea bargaining device;
- In cases where, should conviction ensue, restitution would be in order - unless the defendant freely expresses a willingness to make restitution as a condition of diversion.

4. Conditional diversion - that is, diversion which can eventuate in reinstatement of charges and which requires the person to participate in some formal program of supervision and services - conditional diversion should involve court participation, so that there will be review of the charge and evidence and of the "voluntariness" of the defendant's agreement by someone beyond the prosecutor.

Not everyone agrees with all these points. Some feel that pretrial diversion can legitimately be used as a prosecutor's option intermediate between dropping charges unconditionally and full prosecution, where - (1) High caseloads prevail; (2) In the absence of this condition, the defendant would be prosecuted; (3) There is reason to believe that the sanction and/or services of conditional diversion will actually divert an individual likely to repeat his offense if the instant charge is, in effect, ignored.

There are some programs where plea bargaining is associated with diversion, and in at least two on which reports have been reviewed, there does not appear to be any particular abusive aspect. (See Chapter III, where the contemporary diversion programs are briefly described.)

Restitution also is involved in a number of diversion programs. It is a chief condition in a well organized program primarily for minor property offenders in San Bernardino County, California, which was the subject of a

project site visit. This program has been emulated in other California counties (e.g., San Diego) and is the subject of a bill presently before the State Senate (S.B. 1494, which would authorize and provide subsidy for such a program in any county wishing to sponsor one).

There is a built-in contradiction in such a program. On the one hand, officially, the defendant does not admit his guilt. If he opts out of the program, or fails, he is entitled to a trial on the original charge, and information collected for purposes of the diversion program cannot be used toward convicting him. At the same time, in agreeing to make restitution, he accepts responsibility for the crime, and in effect, would seem to be admitting guilt. The San Bernardino program has been operating for more than three years - with favorable evaluation reports based on a comprehensive and rigorous research design. To date, the restitution issue has not arisen as a practical problem.

A number of programs (conditional diversion) do not involve court participation. Indeed the economic argument for diversion is weakened when one or more court appearances are entailed. Moreover, the district attorney's authority to prosecute or not prosecute is absolute in most jurisdictions. It is argued therefore that there is no requirement of law or ethics for routine court oversight of his selection of diversion cases.

Need for Priorities and Constrained Discretion

No one is likely to argue against the proposition that policy planning on diversion should occur within the context of broader planning of criminal justice operations and priority setting in relation to these.

Our laws not only involve "overreach" in terms of kinds of behavior classified as criminal, but the literal application of laws may extend the intent of the legislature. Often cited as examples are such federal laws as the White

Slave Traffic and National Motor Vehicle Theft Acts. Passed by Congress to deal with organized, inter-state crime in the areas of prostitution and car theft, these laws created nets which caught ordinarily law-abiding persons involved in "peccadilloes" and many thousands of juveniles who stole or rode in stolen cars in the course of what essentially was "joy-riding."

Criminal laws - especially those sanctioned by the threat of incarceration - are passed in response to community feelings of fear, anger, or disgust over instances of gross or repetitive and defiant behavior that hurts people, causes them financial loss, or flies in the face of community mores. Many crime complaints concern people whose unlawful behavior has not been especially gross, repetitive, or consciously defiant. Yet they have allegedly broken a law, and if enforcement is to be waived or moderated, someone must exercise discretion.

A jurisdiction could not possibly afford, economically or politically, to act with full police and prosecutorial vigor on every alleged or suspected violation of every criminal law and ordinance. There has to be some allocation of resources which will result in more rigorous and strict handling of some complaints and some degree of inattention or perfunctory or mild disposition of others. Such priorities and associated policies relate to kinds of crime, circumstances, and categories of defendants.

Criminal law enforcement may reflect carefully planned policies; or policies may emerge, willy-nilly, from day-to-day decisions which represent tacit commitments and serve to set precedents. Enforcement policies may represent system consensus. More commonly they are the sum of policy sets of different agencies, sets which differ in their sources and effects, making for anything but consistency.

It is a great deal to expect, yet to be desired, that police agencies, the prosecutor, the courts, corrections and non-criminal justice representa-

tives of community elements come together periodically and seek agreement on law enforcement priorities and on policies for dealing with those accused or convicted of crime. Discretion is essential at all levels of law enforcement, from the policeman on the beat to the sentencing judge - but discretion should be exercised within boundaries and constraints of conscious policy. Ideally, the policies will reflect community consensus and commitment to the full purpose of criminal justice - that is, to uphold the law with genuine concern both for victims and for the rights and human dignity of those accused.

Diversion Policy Issues

Assuming that a jurisdiction opts for use or expansion of diversion programs, careful policy planning should ensue. Diversion policy planning involves consideration of three kinds of concerns: legal and ethical; law enforcement; and economic. A policy or practice has to pass at least some minimal tests in each area if it is to prove viable.

Legal and ethical. There is widespread agreement that a diversion policy should include recognition of the necessity to protect specified defendant rights. These would include full opportunity to give his informed consent in such matters as waiving right to a speedy trial - or agreeing to various conditions of a diversion program. Also involved is the right against self-incrimination. At the same time, referring to ethical consideration, a chief purpose of diversion should be clear benefit to the defendant in terms of a chance to avoid a criminal record and, in some types of diversion, a genuine effort to provide needed and meaningful services to resolve problems or remedy conditions which could result in future criminal behavior.

Unconditional diversion affords the best assurance of protecting a client's legal rights - inasmuch as dismissal or dropping of charges does not entail

passing a performance test. In effect, the defendant has "everything to gain and nothing to lose." In addition, his use of any services is voluntary; this is presently regarded by many correctional leaders as more likely to result in beneficial effects than where "coercive treatment" is employed. (Neither of these features characterizes unconditional diversion associated with a non-voluntary civil commitment, of course.)

What might be called "one shot" diversion programs would rank next to unconditional diversion in terms of minimal threat to defendant rights. Examples would be mediation or arbitration of citizen disputes such as the Columbus Night Prosecutor program. (Chapter III.)

Pre-arraignment conditional diversion (deferred prosecution) is the method most vulnerable to legal criticism. The possibility exists of "diverting" people who, without such a program, would not have been prosecuted at all or would have been exonerated. There is the hazard, for the defendant, that he will be more seriously penalized if he fails the program than if he had gone directly to trial or guilty plea. Finally, there is the possibility that, had he been convicted, he (1) might have received a penalty less burdensome than the diversion program, in much less time; (2) might have succeeded in a subsequent effort to have his conviction record "neutralized," as through a pardon to restore civil rights.

Conditional diversion at or after arraignment, with judicial participation, affords greater protection against prosecutorial "overreach" and more assurance of informed, voluntary decisions by the defendant. It does not deal any better with the prospect of enhanced severity for the divertee who fails the program.

Law Enforcement. Conditional diversion can result in erosion of a prosecutor's case. The remedy sometimes used - a guilty plea, held in abeyance - lacks the fiscal benefits of diversion at an earlier stage in the proceedings. Moreover, it can make the diversion program more of a handmaiden to plea bargaining than an option in its own right. A policy might be adopted which would rule ineligible for diversion cases where the risk is evident of disappearing witnesses or other developments adverse to successful prosecution.

A broader issue is the possible weakening effect on law enforcement of the extensive use of diversion. Would this form of "non-enforcement" invite more widespread violation of laws? There is no particular evidence, one way or the other, as to this. Certainly if unconditional diversion were extensively practiced - and this were widely known - there might be increased violations. At the same time, if such diversion is limited to the first charge, there would be a ceiling on increases. As to conditional diversion, involving supervision and various performance tests, this would not seem to occasion significantly more crime than the dispositions it most often replaces - such as fines, suspended sentences, and probation.

Economic. The issue here is the cost effectiveness of diversion, in general or in particular forms or levels of use. What is the least costly use of diversion which will yield acceptable results? Who will be the trade offs for differing levels of investment in various diversion programs? How does diversion compare in costs and effects with traditional prosecution and sentencing practices?

As to comparative results, the question is will the community be protected as well in the short run and better in the long run than if traditional practices are followed? So far as short run community protection is concerned,

this is not often a significant issue. Diverting a person ordinarily does not entail any more freedom for him than post-trial dispositions which would probably ensue were he prosecuted. Moreover, most divertees achieve or could achieve pretrial release independently of the diversion program.

The argument is made that diversion should and does produce better long-run community protection than traditional processing. Treatment starts promptly after the events that led to the criminal charge. The social handicap of a criminal record is avoided. Exposure to criminal influences (as in jail) are minimized. Even if there is no magical therapy in the diversion program - so goes the assumption - it is less conducive to recidivism than traditional processing.

Research evidence for this is anything but conclusive. Most diversion programs have shown good results, but efforts to compare them with what would have happened in the absence of diversion have been less than successful.

In the present state of knowledge, it seems safe to say that diversion affords at least comparable community protection in the short and long run as traditional measures most likely to be used if prosecution is not suspended. The economic issue, given this assumption, is which approach costs less.

Costs of both diversion and its alternative include the costs of arriving at decisions; those involved in implementing decisions; and those which result from decisions that have undesired consequences - such as reinstatement or new instances of prosecution or revoking probation or parole because of a new charge or violation.

Unconditional diversion, generally, is the least costly option, so far as direct criminal justice expenditures are concerned. It may lead to other public sector costs, but these are for services (such as mental health treat-

ment) for which the defendant would presumably have been eligible in any event. Citizen dispute settlement is also minimally costly, since extended supervision and service are not involved and case selection usually involves only a one-step, one-agency process. Both these procedures, obviously, have limits as to the kind of situations for which they are appropriate.

Diversion associated with suspended judgement is no more economical than traditional processing, since no criminal justice activity is eliminated. Deferred prosecution ordinarily will save one or more court appearances, and the associated workloads for prosecutor and defense, if we can assume that prosecution would have gone forward and a conviction gained.

These considerations aside, diversion can be more costly than traditional practices if it entails more supervision or services. If the average defendant would have received a suspended sentence or a fine, and the average divertee is placed in the equivalent of formal probation status, obviously this will add to system costs. On the other hand, assuming that the divertee, if convicted, would have been placed on formal probation, diversion program costs might be less. The latter usually entails a supervision period of only three to six months, while probation, on the average, is likely to run well over a year.

Logically, expenditures for case selection, for supervision, and for services should be related to the circumstances of the crime and to the characteristics and situation of the defendant - not to whether the issue or status involved is diversion or some sentencing option. In practice, however, especially with misdemeanants, sentencing is handled with minimal case investigation or evaluation - while diversion usually entails a comparatively extensive case study. Moreover, again more so with misdemeanants, sentences do not call for supervision and services, whereas diversion ordinarily provides for these.

This is not to imply that decisions to divert should be handled casually - nor that needed services should be withheld from divertees. On the contrary, in many jurisdictions, there is need for less casual handling of the sentencing function and for expansion and improvement of probation services. The costs of the diversion program cannot be fairly assessed in a jurisdiction where pre-sentence investigation and probation services are grossly deficient or under-utilized.

At the same time, some diversion programs do appear to involve overly elaborate case studies and programs of supervision and service - given the comparatively uncomplicated, non-dangerous cases dealt with. What is called for is varying levels of case study and supervision - reserving more expensive procedures and services for individuals who present the greatest challenge.

As innovations, diversion programs may have to be comparatively expensive. With experience, however, as has been demonstrated in some programs, it is possible to evolve short-cuts in decision-making, to identify people who do not need supervision, and to be selective in the provision of services. A sound principle to follow, with a mature diversion program, is that the costs of supervision and services should be no greater than would be appropriate for the same individual, were he convicted and sentenced; the decision-making cost should be less, since there should be some saving in reduced legal processes.

Recap

Diversion planning, ideally, should be an aspect of comprehensive criminal justice policy planning in a jurisdiction. This should encompass law enforcement and prosecution priorities, pretrial detention and its alterna-

tives, varying modes of diversion, sentence options, services to courts and to defendants.*

Relationship of diversion to possible decriminalization should be considered - for example, whether a program may be used as a test of the feasibility and desirability of decriminalization of some offense category.

In line with the principle of using the least costly and least interventionary practices appropriate in given situations, diversion practices might best be considered in the following priority order, keeping in mind that level 3 is generally thought to entail the greatest risks of "overreach" and potential abuse of defendant legal rights:

1. Unconditional diversion
    a. Police level
    b. Jailer level
    c. Prosecutor level
    d. Court level
2. Dispute settlement
    a. Police level
    b. Prosecutor level
3. Pre-arraignment diversion
    a. Limited screening, minimal supervision and service, brief supervision period
    b. More extensive programs
4. Post-arraignment diversion
    a. and b. As above (pre-arraignment)
5. Post-trial diversion

* Services for victims and witnesses also require attention, but these have been outside the scope of this publication.

Selection of the appropriate point of intervention and diversion mode involves consideration of common characteristics of various groupings of arrestees (grouped by offense category, criminal record, crime-related social problems, or some combination of these). In this connection reference is suggested to Chapter II.

Reference is also recommended to detailed standards for diversion which are presently under consideration by the National Association of Pretrial Service Agencies. These were recommended to the association at the 1976 national conference, having been developed by a committee chaired by John Calhoun and Madeleine Chrohn.* The proposals are reproduced in full as the concluding section of this chapter.

* John Calhoun is Commissioner of Youth Service for the State of Massachusetts and former director of a diversion program, the Resource Institute of Boston. Madeleine Chrohn is Director of the Pretrial Services Resource Center, Washington, D.C., and formerly directed a diversion program in New York City, the Court Employment Program.

DIVERSION STANDARDS RECOMMENDED FOR ADOPTION BY THE NATIONAL ASSOCIATION OF PRETRIAL SERVICE AGENCIES*

A. GOALS AND OBJECTIVES

SUGGESTED PRINCIPLES:

* Pretrial diversion programs may intervene at any of the following points:
  - Pre-arrest
  - Pre-arrest
  - Pre-charge
  - Post-charge
  - Pre-arraignment
  - At arraignment
  - Post-arraignment

* They should:
  - Provide eligible defendants with needed services as an alternative to the regular adversary proceedings
  - Lead towards an eventual dismissal of charges
  - Include, as an ongoing policy, increasingly high-risk cases
  - Encourage expungement of records

* They should also:
  - Be a viable alternative to the existing court systems or programs
  - Provide the court, at no time, with the possibility to
    - control more intensively a specific clientele than the normal court process would
    - extend controls over a larger number of individuals than the normal criminal justice process would otherwise allow.

* Prepared by NAPSA Committee on Standards and presented at the 1976 annual conference in New Orleans. The Standards were subsequently refined for re-presentation at the May, 1977 Conference.

Further, the following is RECOMMENDED:

- Goals should be clear and attainable
- Project organization should flow naturally from stated goals
- Goals should be quantitative and measurable (e.g., dismissal rates, project acceptance rate, rearrest rate, increased earnings). They should also be qualitative and describable (e.g., attitude surveys).

Examples of Goals:

- To establish pre-trial diversion as a permanent part of the state's criminal justice system;
- To remove from the traditional system of adversary trial those accused of criminal acts who are likely to benefit from an effective community-based program of habilitation.

B. LEGAL ISSUES

SUGGESTED PRINCIPLES

* Potential clients must be informed of their right to counsel and must be encouraged to seek concurrence of counsel prior to program entry. They must be informed verbally and in writing of program duration, possible outcomes, and program requirements.

* Clients must have their basic rights safeguarded. Clients must be advised of such rights, and sign waivers necessary to safeguard recognized constitutional rights and constitutional guarantees (e.g., right to speedy trial). In regard to the right to speedy trial, such waiver must not prejudice the right to a speedy trial should the defendant be remanded to the court process following non-completion of the program.

* Defendants must be considered by diversion programs regardless of sex, race, employment, financial status, residence status, age, and prior records.

* Any information that is not public knowledge, and which pertains to criminal and treatment information, will not be disclosed to any parties, unless the defendant agrees to waive such disclosure in writing (with advice from counsel).

* Nonincriminating information will be provided to the diverting authority in order for it to reach a reasonable decision. It should not include information which represents a needless invasion of privacy. It should be limited to:

a) in the case of non-completion of the program:

- reasons why the program requires additional time
- a statement that the program resources did not meet the client's needs

b) in the case of completion:

- a statement of positive treatment/vocational situation.

* Clients must have the right to termination hearing (with counsel and appropriate diversion staff in attendance). The hearing officer should preferably not be involved with the case.

Further, the following is RECOMMENDED:

- Programs should attempt to foster legislation/court rulings or other sanctions regarding confidentiality of records.
- Programs should be prepared for the possibility of subpoena of records. Programs should consult with appropriate legal authorities in the development of a strategy and position consistent with the principles described above.

C. ELIGIBILITY CRITERIA AND PARTICIPANT CHARACTERISTICS

SUGGESTED PRINCIPLES:

* Formal eligibility criteria must be established after consultation with the appropriate criminal justice officials and program representatives, and be consistent with the goals stated above (refer to Chapters A and B)
* The mechanics and purpose of the intake process should be clear to all parties and there should be a written understanding with proper justice authorities.
* Program participation must be voluntary on the part of the defendant.
* The admission of guilt should not be a requirement for admission to diversion programs.
* It is understood that programs often begin with modest intake criteria and then expand these criteria as credibility grows with the criminal justice system. Programs should constantly but reasonably attempt to expand, as opposed to finalize, these criteria.

Further, the following is RECOMMENDED:

- Intake process should involve two steps:
  - initial criminal justice screening, and
  - project assessment
- Intake may involve consultation with the victim and the police officer; however, the state's decision to defer prosecution must rest with the district attorney's office.

D. PROJECT DESIGN

1. STRUCTURE AND OPERATIONS

* The pretrial diversion program must be able to deliver the following services: screening, counseling and career development.

* Criteria, program goals and positions on legal issues must be understood, assessed and implemented by program staff, reflected in the program operations.

* The diversion program must remain open to refinement and to possible new directions (e.g., drug diversion, juvenile diversion, etc.). It must allow some flexibility with respect to duration of the program and criteria for completion.

* It is essential to include criminal justice personnel during the initial stages of a new program. This personnel can work closely with the project staff and provide valuable information as advisors.

Further, the following is RECOMMENDED:

- Advisory boards provide invaluable assistance and serve to generate commitment to diversion concepts. A mixture of political, prestige and expert figures, as well as representatives of funding sources, administrators of other service delivery programs, community, media, business, criminal justice, and client representatives, are some of the groups which should be asked to serve on such board.

- Diversion programs should encourage visitors and stimulate internal self-criticism and openness to change.

2. COUNSELING

SUGGESTED PRINCIPLE:

* Although counseling style will vary depending on program thrust, available assistance, and nature of the client population, the

diversion program should base its services on the following principles:

- Counseling will not be used as a coercive or punitive measure.

- The programs must make every effort to explain the need and the reasons for counseling offered to him/her (realistic, written service plans with achievable goals should be developed in conjunction with the client).

Further, the following is RECOMMENDED:

- Programs should attempt to engender a sense of self-worth and legitimate survival in their clients; should avoid patronizing by placing as much responsibility as possible on each client; should foster client decision-making skills and independence.

3. CAREER DEVELOPMENT AND COMMUNITY RESOURCES

SUGGESTED PRINCIPLE:

* Whether or not career development is a separate unit, the diversion program must utilize manpower resources in the community, seek out and be aware of all employment possibilities available to its clients in that community, and campaign within the community for support in the hiring and serving of the diversion population.

* The program should be aware of, and be able to utilize and/or develop job taining and educational resources, basic emergency services (medical, shelter, food, clothing), special commitments and slots from resource agencies.

Further, the following is RECOMMENDED:

More specifically:

- If not a separate unit, the diversion program should obtain a manpower capacity (e.g., outstationed employment service workers).

In addition, the diversion program should:

- Stress job development and job creation;

- Be prepared to work and alter traditional business hiring patterns;

- Be able to make realistic placements;

- Have a structural organization fostering teamwork between counselors and career development personnel.

4. SCREENING

SUGGESTED PRINCIPLES

* The pretrial diversion program which screens on its own (pending the court's approval) must insure that eligibility criteria and program goals are respected; intake policies and entry criteria must be periodically reassessed.

* The pretrial diversion program which relies on outside screening resources (such as the DA's office) must reserve the right to refuse defendants who do not fit eligibility criteria/program goals.

Further, the following is RECOMMENDED:

- It is vital that a program have a screening "presence" in court.

- It is equally vital that the program have personnel able to evaluate changes in the court which support or endanger the program's existence and impact of the program on the court system. Personnel should also be prepared to promote with court officials the concept and relevance of the program.

E. STAFFING AND HIRING

SUGGESTED PRINCIPLES:

* The diversion program is designed to service a particular community, as well as its clients. The staff should therefore be a representative of that community and share/understand their concerns.

* At the same time, it is equally essential that the staff be selected on the basis of skills and experience, and that the staffing pattern chosen foster the best possible delivery of services to its clientele.

* The diversion program must ensure that appropriate and supportive training will be provided to its staff.

* The labeling of professional and para (non) professional generally proves demeaning as well as meaningless, and must be discouraged.

* Job qualifications and descriptions, and personnel policy must be clear, written, and communicated to staff.

Further, the following is RECOMMENDED:

- A well-balanced staff comprising those having life experience and those with academic experience has generally provided the best results. Staff with life experience, and with a knowledge of the clientele, can provide some of the more immediate and valuable services to clients, while academically trained staff can provide the necessary training and ongoing consultation.

- Analysis of the community and its special needs should lead to the hiring of staff with particular skills (e.g., bilingual community; female offenders; etc.)

- Staff organization should take into consideration the nature of local resources (e.g., if an area has an abundance of jobs, the diversion program can concentrate less on hiring job developers and more, perhaps, on counselors).

- Volunteers can be a useful resource; however, it must be remembered that, especially in the area of direct delivery of services, volunteers must be placed under the same supervision and accountability as regular staff members.

- Hiring process should be rigorous. Inclusion in the hiring process of existing staff members is advisable.

F. EVALUATION AND RESEARCH

SUGGESTED PRINCIPLES

* Pretrial diversion programs provide alternatives to regular proceedings and to the criminal justice system. In order to evaluate their efforts and plan for further development, they must keep the data necessary for research.

* Whichever research methods or programs are developed, the rules of confidentiality and protection of the client must be observed.

Further, the following is RECOMMENDED:

- A research component should be built as part of the organizational structure, or provisions be made for outside evaluations. Research should be included in the initial project design.

- A research component, whether internal or contracted, must include the capacity for data handling and processing, for analysis of data and for follow up.

- A combination of quantitative and qualitative measures is necessary. Measures of success should be multiple and realistic. The use of single or out-of-context indices or predictors are strongly discouraged (e.g., rearrest rate as a sole measure of success or failure).

G. INSTITUTIONALIZATION

SUGGESTED PRINCIPLE:

* In the anticipation of possible institutionaliation, or change in sponsor, the diversion program must determine whether such changes would jeopardize or significantly alter the initial premises of the program. The program must take an active part and plan for the safeguarding of its integrity and purpose.

Further, the following is RECOMMENDED:

- From its inception, the program should consider its long range place in the criminal justice program as to continued operations and funding.

CHAPTER II

PLANNING DIVERSION PROGRAMS

Assuming there is interest in the possible introduction of new diversion measures in a jurisdiction -- in addition to basic issues discussed in Chapter I -- thought must be given to organizational arrangements, priorities in case selection, prospective workloads, and related organizational and staffing requirements.

Patterns of Diversion

The practice of diversion does not lend itself to easy analysis because of its complexity. It may occur at any point after receipt of a criminal complaint or observation of a crime up to the court's formal finding after plea or trial. It may be employed by police, prosecutor, or judges. It may or may not involve other agencies in or outside of criminal justice. Moreover, the purposes of diversion range widely.

At times diversion is used, more or less knowingly, as a substitute for legislative action to decriminalize certain activities or to modify penalties. Handling of public intoxicants and minor drug law violators are particularly common examples. One good example is a new diversion program for drunk drivers in Phoenix that emerged in the wake of legislation mandating jail sentences for such offenders. (See Chapter III.)

Diversion is also used, selectively, to make it possible for non-major situational offenders to avoid the stigma of a criminal record - while still holding them under the threat of this for some test period.

With some categories of arrestees, diversion serves primarily as an approach to prompt and sanctioned remedial treatment of problems afflicting them which are thought to be "criminogenic" - alcoholism, drug addiction, and vocational deficiency, for example.

Diversion is also used for persons who are classified as mentally ill or incompetent - and either not equipped to stand trial or seen as needing a form of incarceration and treatment different from imprisonment. This may be used with mentally ill or retarded, with "dangerous" sex offenders, and, in some jurisdictions, with criminal offenders who are addicted to drugs. Diversion, in these instances, may be associated with dropping of the charge and referral of the accused to an agency for voluntary treatment; or it may involve civil commitment to an institution in lieu of prosecution and a sentence to a jail or prison.

Diversion may be used as an "intermediate" sanction - a comparatively mild combination of restrictions and penalities, more than summary dismissal of charges and less than conviction and sentencing. In this instance, it may extend the reach of criminal justice sanctions to people who - at least under existing conditions of heavy caseloads - would ordinarily not be prosecuted at all.

Figure 1 summarizes common patterns of diversion practice. The chart points up the fact that diversion may occur at any of several stages in the criminal justice process. The diverting agency tends to vary with the stage, although overlaps occur: police at the point of arrest or possible arrest; prosecutor following arrest or a citizen's complaint until trial or formal plea of guilty; judge after the verdict is in.

Figure 3

Levels and Kinds of Intervention in Relation to Criminal Justice Stage where Diversion May Occur

EXAMPLES OF INTERVENTION LEVELS	STAGE AND AGENCY WHERE DIVERSION OCCURS			
	POLICE	PROSECUTOR	PROS. OR COURT	COURT
	PRE-ARREST	PRE-ARRAIGNMENT	PRETRIAL	PRE-JUDGEMENT
1. WARNING/REPRIMAND	×			
2. REFERRAL TO APPROPRIATE RESOURCE	×	×		
3. PROBLEM SOLVING SERVICE— COUNSELING, MEDIATION, ARBITRATION, ETC.	×	×		
4. (REFERRAL FOR) CIVIL COMMITMENT	×	×	×	×
5. CONDITIONAL SUSPENSION OF PROSECUTION OR FINAL JUDGEMENT OF GUILT, WITH OR WITHOUT SUPERVISION AND HELPING SERVICES		×	×	×

Levels of Intervention

Diversion entails some intervention in the life of the accused, albeit ordinarily less drastic than its alternative. Intervention levels and modes range from "warning and reprimand" or somewhat more complicated problem-solving action to extended periods under supervision, often involving required participation in various therapeutic, training, or educational programs.

The first four levels of intervention on the chart present efforts at "one-time" solution of a problem, rather than embarking on interaction with the defendant that may extend over a period of months. The client may be involved with a service agency, but outside of and with "no strings" from the criminal justice system. Examples include:

- Release by officer in the field after "dressing down" or "counseling" - rather than arrest and filing of a charge. Typical use would be in family quarrel situations, neighborhood disturbances, public intoxication, marijuana possession, and various regulatory violations.
- This transaction might be accompanied by a recommendation to the accused person (or his family) that he seek help with some evident problem from a particular community resource.
- Problem solving. Somewhat involved situations of the same general character as those above may call for more than a brief, informal transaction. There may be a need for some investigative activity, perhaps an informal "hearing," and for such procedures as mediation or arbitration. The Columbus, Ohio, "Night Prosecutor" program is an example of this mode. (See Chapter III).
- The most common example of "civil commitment" on the part of a police officer would be escorting a public inebriate to a detox center in lieu of booking him into a jail. There are also commitments by the courts to hospitals for mentally ill persons defined as dangerous, dangerous sex offenders, and, in some jurisdictions, narcotic addicts.

Level 5 on the chart represents conditional diversion - suspension of prosecution or judgement pending the outcome of the defendant's performance during a trial period. Defendants involved have been arrested or cited, and this intervention can occur prior to any court appearance, prior to formal plea, or in the case of suspended judgement, following plea or trial.

Typically, the defendant must undergo a period of testing - three months,

six months, in at least one instance until the statute of limitations applies.[1] A universal feature of the test is avoidance of further criminality. A welter of other conditions are to be found, including -

- No reversion to alcohol or drug use;
- Maintain employment or attend school;
- Participate in a program of counseling, education, therapy, vocational training, etc;
- Perform community service and/or make restitution;
- Submit to anything from limited monitoring of participation in a prescribed program to extensive limitations on and surveillance of day-to-day activities and associates;
- Admit self to a residential treatment center (e.g., alcohol or drugs) and remain until found ready for release by program manager.

The defendant may be free to undergo the test of no further criminality "on his own." More commonly, he is presumed to need both "help" and some degree of "control" to assure that he succeeds. Helping services may be directly supplied by a criminal justice agency such as the probation department. Often criminal justice stops at the point of referral to other agencies for such services, while maintaining responsibility for monitoring the client's performance.

Administrative Arrangements

There are a variety of arrangements for administering diversion programs. These are summarized in Figure 2. Services are broken down into:

- Screening
- Evaluation/advocacy

- Monitoring
- Surveillance
- Residential care and custody
- Giving information, referral service, and supportive counseling
- Providing technical or professional service of a therapeutic, vocational, or educational nature.

As the chart indicates, most of these services may be provided either by any of the criminal justice agencies or by public or private agencies outside criminal justice. The latter may, however, be "beholden" to the criminal justice system where they are performing services for it under a contractual agreement.

Some diversion advocates strongly favor use of private agencies for case screening and evaluation and implementation of services following the decision to divert. They see less chance of abuses and under-utilization when a non-governmental agency is in a position to advocate for the defendant. A similar argument is used to justify assignment of these responsibilities - especially in relation to case selection - to the public defender.[2]

A report in 1974, listing 53 adult diversion programs, showed the following distribution by administrative location:[3]

• Private agency (frequently a non-profit corporation specifically established to carry on one or more diversion programs in an area)	20
• Prosecutor's Office	12
• Probation or court social service division	11
• Public defender or legal aid society	3
• Public agency not within a traditional component of criminal justice system	5

Figure 2

Patterns of Distribution of Diversion-Related Services among Different Categories of Agencies

	Case Selection		Client Control			"Helping" Services	
	Screening	Evaluation, Advocacy	Monitoring	Surveillance	Resident Care and Custody	Information Referral, Supportive Counseling	Technical, Professional
Police	X	X	X			X	
Prosecutor (or staff under him)	X	X	X	X		X	X
Court (or court staff persons)	X	X	X			X	X
Corrections[a]	X	X	X	X		X	X
"Independent"							
Public Defender	X	X				X	
Non-C.J. Public agency[b]	X	X	X	X		X	X
Private agency							
Contractual[c]	X	X	X		X	X	X
"Own funds"	X	X			X	X	X

a Probation or a more comprehensive corrections agency.

b Could be federal, state, or local. Might, in effect, be a correctional agency, but a newly established one and not under control of any of the traditional ones.

c Contract could be with one of the criminal justice agencies or with a non-criminal justice agency or general county government.

- Court administration 1
- Prosecutor and probation 1

These figures do not tell the whole story. Often diversion programs, while "hosted" by a particular agency, involve two or more. Screening may be done by one agency (e.g., a pretrial release or "TASC" agency); review and decision-making involves the prosecutor's office and/or the court; provision of services may be by a third agency and "case tracking" or monitoring by another.

Unstructured Programs. Police diversion programs may go forward without special structure. For example, it may be a matter of departmental policy for patrol officers to settle as many family and neighborhood dispute situations as they safely can - without resorting to arrest and a criminal charge. Special training may be provided to enhance their skills in evaluating and dealing with such situations. There may be no provision for routine overseeing of this activity nor for tabulation of the instances of such adjustments as compared with arrests in more or less similar circumstances (except possibly during a test "evaluation" period related to a federal grant for their training). This level of informality - while it may accomplish a great deal of good - defies assessment or trend measurement. It is not so much a program as an agency posture which lacks documentation.

Structured Police Programs. At the other extreme, a department may provide for referral of particular categories of cases to specially trained and assigned officers. Careful records may be kept, follow up may be carried out, and statistics useful in evaluation may be maintained.

Police may seek to resolve problems themselves or may refer people (possibly even escorting them) to community agencies, where their needs might be better met.

In Sacramento, California, a two-man team carried on a small scale drug diversion program for two years within the police department. (It was dropped when the penalty for possession of small amounts of marihuana was reduced to a modest fine as of January 1, 1976.) Officers arresting minor drug offenders, thought to have no prior drug or felony record, were encouraged to "cite" them to appear at police headquarters for an interview with one of the "drug diversion" officers.

Arrestees found to meet program requirements, who wished to take advantage of it, would then spend thirty days in a program of drug education and counseling. This was provided by the officers, with occasional referrals to specialized community agencies. If there were no further arrests and the modest program requirements were met, the arrest report was never filed with the court or prosecutor. Failure to participate in the program or new arrests within the month could result in filing of the original complaint. (Actually, there were no such instances in the comparatively short life of the program.)[5]

Police Use of Referral. Alternative to the Sacramento arrangement was a demonstration program begun in May 1975 in two New York City Police Precincts (Manhattan 30th and 34th). This involves police diversion of cases involving family and neighborhood disputes. Instead of arresting accused persons - where feasible - the plan called for the officer contacted by the complainant (or witnessing the quarrel) to refer both parties to a dispute center situated in the neighborhood. The center is operated by the Institute for Mediation and Conflict Resolution (IMCR), with LEAA financing during the demonstration period. Neighborhood volunteers, after four-months' training by IMCR, handle the mediation sessions.[6]

There are numerous examples around the country of another commonly used

police diversion practice, where referral to community agencies is the rule. This is escorting public inebriates to alcohol detoxification centers instead of booking them into jail. This practice is discussed further in Chapter III.

Pre-Arraignment Programs. These come into operation after a criminal complaint reaches the prosecutor, but ordinarily before first court appearance. Prosecutors occasionally operate programs "in-house," from screening through provision of supervision and services. Such a "pretrial probation" program was observed in the District Attorney's Office in Albuquerque, New Mexico. A small unit staffed by former probation officers assisted an assigned deputy in screening cases, conducted preliminary discussions with defendants who were tentatively selected and their attorneys, then provided supervision and services to those who agreed and were approved for the program.[7]

More often, social investigations and evaluations as well as supervision and services are provided by arrangement with an agency outside the prosecutor's office. In some instances, common in California, this is a unit of the county probation department. In others, it may be an independent agency (either local governmental or private). Often the program was originally advocated by the non-prosecutive agency, with the prosecutor simply agreeing to (1) refer cases meeting certain criteria or (2) review and approve or reject cases screened and recommended by the service agency.

Post-Arraignment Programs. These are programs where the judge becomes involved. His role may range from ratification of the district attorney's plan to defer prosecution, conditionally, in a case - to himself selecting cases and initiating referrals to the screening agency. If this involves suspension or deferral of prosecution pending successful completion of the diversion program, the prosecutor would participate in the decision. Where, as

in Hawaii as an example,[8] it is a matter of suspending judgment after conviction is had, the decision is wholly within the judge's province - although he could hear the prosecutor's views before deciding.

As with pre-arraignment programs, typically these invoive a screening and service agency outside the prosecutor's office and usually outside the court. Ordinarily, if within the court structure, the program would be managed by the probation office.

Screening, Monitoring, and Services. At times one agency (within criminal justice) screens and recommends cases for diversion (either to prosecutor or court) and monitors the performance of those approved - but services are provided through referrals to other (non-criminal justice) community agencies. The monitoring agency may provide no counseling at all, and follow up may be a matter of obtaining reports of client performance from referral agencies and of any re-arrests from police agencies or the jail. An example of this would be the California Penal Code 1000 program as operated in San Diego County for minor drug offenders. (See Chapter III.)

Several examples of diversion programs are reviewed and referenced in Chapter III.

Planning Considerations

Diversion programs of many sorts have emerged piecemeal across the country. Some have been fostered or even mandated by state legislation (e.g., in California, Penal Code 1000 provides that certain minor drug offense cases will be considered for diversion and sets forth screening procedures, selection criteria, and other program elements in some detail.[9]) The vast majority of programs, however, were started out of local initiative and without specific statutory authorization.

Generally speaking, the prosecuting attorney's acquiescence is essential; in many instances, the judiciary is also involved.

Diversion policies, more often than not, do not reflect broad or long-range planning across the spectrum of criminal justice. Rather, programs usually come into existence because individuals or groups within or outside the system undertake advocacy for particular client categories and succeed in getting a favorable response from some one component within the system - police, prosecutor, or court - or from the legislature.

Progress in any area of human endeavor ordinarily occurs in halting, piecemeal, inconsistent ways. Community life is not an exercise in logic, but a reflection of interacting initiatives, forces, and perceptions of problems and opportunities. To the extent that diversion programs mean progress - one should not discourage their adoption or hamstring their development by insistence on any particular approach to planning or introducing them or on any single program model.

At the same time, it should be useful to set forth and discuss elements of a comprehensive diversion program to assist local jurisdictions in reviewing priorities and setting short- and long-term goals in this area. Issues in policy planning in relation to diversion include especially the following:

1. Categories of defendants to be considered and the objectives to be served.*
2. Point where screening should take place.
3. Assignment of responsibility for screening.
4. Determination of who should make or participate in final decisions, including provisions to assure the defendant's knowledgeable consent.

*Assuring equal protection of the law (see Leonardis v. State of New Jersey).

5. Setting the outer limits of the program, that is, minimum number to justify a formal program and maximum number to plan for in terms of such considerations as public acceptance and cost effectiveness.
6. Related to #5, what would be desirable/tolerable in terms of success/failure rates.
7. What conditions and services would be attached to the diversion program and who should implement these.
8. What arrangements and considerations should be included in the subsequent evaluation of the program.

How some of these questions are being answered in jurisdictions across the country is illustrated by brief descriptions of several programs in the next chapter (III). Meantime some suggestions and data are provided below as an aid to diversion policy planning in jurisdictions where experience with the practice may be limited.

Categories of Prospective Divertees

Figure 3 presents an approach to categorizing offenses and defendants as a step in planning diversion policies and programs. Four groupings of possible "divertees" are identified:

1. People involved in interpersonal and inter-group (primarily "neighborhood") conflict situations.
2. Persons involved in serious or persistent traffic law violations who incur arrest.
3. Other "non-major" crime involving situational offenders.
4. Offenders seen as victimized by some condition which, in effect, accounts for their propensity to get involved in crime.

Figure 3 - Categories of Crime and/or Offenders for Use in Considering Diversion Policies

- Interpersonal/inter-group conflict situations which represent or can result in crimes
  - Family quarrels
  - Disputes between neighbors
  - Some minor property crimes
    - Vandalism
    - Disorderly conduct
    - "Within neighborhood" instances of shoplifting, bad checks, pilfering, etc.
- Serious traffic offenses
  - Driving Under Influence of Liquor
  - Other (especially repeated)
  - Scofflaw instances
- Other non-major crime involving "situational" offenders
  - Drug law violations
  - Property and other non-traffic crimes
- Offenders with serious "criminogenic" personal problems
  - Alcoholics
  - Dependents on other drugs
  - Persistent sexual offenders (dangerous)
  - Mentally ill persons (dangerous)
  - Vocationally handicapped

Possible Caseloads

In figure 4, using FBI 1974 Uniform Crime Report data on the relative frequency of arrests for common arrest categories, data are presented for a hypothetical jurisdiction. Offense groupings follow the pattern set in Figure 3. The rates for "probably divertible" cases represent the highest rates we have found in diversion programs for the specified offense categories. It should be pointed out that we have found no jurisdiction with such high rates for all categories.

The 90% rate for public inebriates can best be related to jurisdictions where the offense of public intoxication has been eliminated. Where arrests are still being made on this charge, the highest diversion rate found was about 58%.[10]

Using the diversion rates for all categories listed in Figure 4, and assuming that public intoxication is still an offense, almost half of persons subject to arrest might be diverted. Eliminating public inebriates from the picture, the rate would still be high, one-third. We were informed that 30% of all felony arrests resulted in diversion in one jurisdiction, but this is well above any overall percentage we are aware of in any other jurisdiction, and of course it did not embrace a similar percentage of misdemeanants.[11]

These figures are not presented as a recommendation for a diversion rate, but only to indicate the "open-ended" nature of this issue. On the one hand, such a high overall rate of diversion would invite the criticism that diversion is blanketing people into the criminal justice system rather than screening them out of it. In other words, it would probably be associated with a low rate of prosecution refusals or dismissals on initial presentation. At the same time, it could be used by critics of the criminal justice system who decry a lack of vigor in prosecuting offenders and of stringency in dealing with them.

In addition to weighing these considerations, policy planners would have to consider the level of failure which would be acceptable. The more defendants diverted, as a general rule, the more cases of failure. Moreover, the more liberal the policies in diverting higher risk cases, the higher the rate of failure is likely to be.

Figure 4

Arrests, % Prosecutable," and % Probably "Divertible
Hypothetical Jurisdiction

			Probably Prosecutable		Probably "Divertible"	
Total Arrests	12,000	(12,203)[a]				
Part I Violent & Firearms	(7.0)	840	75%	(630)	——	——
Other "Interpersonal"	(15.4)	1,848	80%	(1,478)	20%[b]	(370)
Property	(17.3)	2,076	85%	(1,765)	20%[b]	(415)
Drugs	(7.2)	864	75%	(648)	60%[c]	(518)
Public Intoxication	(18.9)	2,495[a]	95%	(2,370)	90%[d]	(2,245)
Traffic & Manslaughter	(17.0)	2,040	90%	(1,836)	60%[e]	(1,224)
All Other	(17.0)	2,040	85%	(1,734)	30%	(612)
Drug Dependents	($E_{3.0}$)	360	80%	(288)	30%	(1,081)
TOTAL	(100.0)	12,203	85.7%	(10,461)	45.0%	(5,492)[e]

[a]Public intoxication arrests would total 2,268. We added 10% on assumption this might represent the frequency, nationwide, with which such persons are taken by police to detox centers instead of to jail. The total in parentheses is adjusted to accommodate this addition. Percentages for various crime categories in the arrest column are of the 12,000 total.

[b]Diversion of the majority of these might through "adjustments" and referral service at the police and/or prosecutor level (e.g., "dispute settlement" programs).

[c]Half to two-thirds of these would be for possession of marihuana, usually, in small quantities. Decriminalization would be more economical and probably about as effective as diversion.

[d]Diversion, in this instance is primarily by police to detox centers.

[e]If we exclude public inebriates from all calculations, we arrive at the following: 9,708 arrests; 8,091 "prosecutable" (83.3%); 3,247 "divertible" (33.4%).

Three studies, completed in 1974, have gone into those issues more extensively and in greater depth than was possible (or contemplated) for this project.[12] They overlapped somewhat in purpose and programs reviewed (Mullen, Pretrial Intervention, 1974, and Pretrial Services, 1974; Rovner-Pieczenik, 1974). They reviewed evaluations and statistical data of several diversion programs both in terms of results reported and the adequacy of the evaluations themselves. Their findings were generally not inconsistent, but they differed in conclusions.

Ms. Rovner-Pieczenik evidently accepted the concept of pretrial diversion and devoted her recommendations to suggestions for assuring fairness and legal soundness generally in use of diversion, for expansion of programs, and for research useful in planning program improvements.

Ms. Mullen, especially in her second report (Pretrial Services), seemed more impressed by the drawbacks inherent in diversion. She placed more emphasis on various alternatives to diversion than on ways of improving or extending existing programs.

A review of the three reports would give support to the following propositions:

1. Validated research evidence is lacking to justify the assumption that formal pretrial diversion programs will result in less long-term recidivism than either unconditional diversion or traditional court-corrections processing and treatment. (This does not rule out the possibility, but research evidence on this point is lacking or inconclusive.)

2. There is some evidence that people, while in formal diversion programs, are less frequently re-arrested than comparable defendants not diverted. Again, valid research data are skimpy, so

that from a scientific standpoint it is not possible to generalize on this issue to diversion programs as such.

3. Vocationally disadvantaged divertees appear to benefit from formal programs offering vocational and job placement services. But these findings are not demonstrable for all such programs, and many diversion programs do not emphasize this kind of service.

4. Costs of diversion programs vary extensively. The benefits are frequently difficult to assess - some being non-quantifiable, such as defendant's avoidance of a criminal record. Savings to the criminal justice system from diversion are not easy to document - partly because valid unit costs for many activities do not exist, but more importantly because determining just what criminal justice decisions would ensue had an individual not been diverted is speculative. A limited amount of cost-benefit research has been done, employing assumptions as to percentages of divertees who would otherwise have been prosecuted, convicted, sentenced to jail or prison, or placed on probation. The authors did not find the conclusions fully convincing because of weaknesses in research design or data limitations.

In short, embarking on a diversion program is pretty much an act of faith. From a common sense standpoint, there are evident possibilities for reducing court processing costs, important intangible benefits for the defendant (if he is a success), and the risk to the community is no greater than comparable dispositions which might be made subsequent to a conviction, such as probation.

At the same time, program costs certainly need not exceed costs of a probation program. This assumes (1) that the diversion program provides supervision and services on the basis of demonstrated need and motivation - not

ritualistically in all cases; (2) that the comparable probation program does likewise. Essentially, the only differences between them are the legal status of the participants and, presumably, the lesser commitment to criminality of the divertees. (In practice many diversion programs are more richly staffed and and have other resources beyond those of probation departments in the same jurisdiction. This has almost always reflected the effects of program novelty and heavy federal funding. In the long run it seems likely and logical that these differences will disappear.)

Program Evaluation

Each jurisdiction operating a diversion program does well to observe it through formal on-going evaluation.

Because of ethical, legal, and political issues inherent in a classical research design for a program of this sort, it is questionable how much "truly scientific" research can be anticipated. (For example, an experiment where randomly selected groups are diverted unconditionally, assigned to formal diversion programs, and processed traditionally.) This is not to discourage such plans, where they may exist, but to caution against high expectations that a "science of diversion" is only a matter of time.

It is possible to do a number of administratively useful things, however, without resort to experimental research.

1. Identified objectives can be set forth for a program: (a) operational objectives (such as numbers of various categories of cases to be screened and provided various levels of supervision or types of services); (b) performance objectives (percentages of clients who will complete the program successfully and benefit in specified ways). Operations can be monitored and statistics

tabulated to permit assessment of how well objectives were accomplished. Services or methods producing disappointing results can be scrapped or modified (unless there is reason to believe that objectives were set unreasonably high). Unpredictably high rates of success may suggest liberalization of selection criteria (or use of unconditional diversion for categories of people who don't appear to need supervision or services).

2. Statistics for the diversion program can be analyzed in the context of system-wide statistics - assuming an information system exists to provide these. The results might throw light on a number of issues: how significant is the diversion program (e.g., number of participants as a percentage of the total criminal justice caseload)? how does the group differ, in terms of various characteristics, from arrestees generally - or from groups disposed of in particular ways other than through this program? How do re-arrest rates compare over similar time periods? How do divertees perform, in various other ways, as compared with probationers?

3. More precise cost data can be developed for the diversion program. The same can be done with such other programs as various type of pretrial release, probation, parole, or confinement in various types of facilities. Gross comparisons can be made as well as comparisons in which account is taken of differing client characteristics and/or different kinds and levels of service. Out of this may well come practice modifications in either diversion or other kinds of programs.

The costs of activities saved by diversion (e.g., number of court appearances) can be identified, and it may be possible, through reference to system statistics, to estimate with reasonable accuracy the type and level of such activities which the average divertee would have experienced if not diverted.

Another approach to this latter kind of "system impact" by diversion would be possible in a jurisdiction where arrests are on the rise. It might be demonstrated, for example, that diversion permitted the system to cope with the increased intake without commensurate additions to the bench or court facilities or to the staffs of the prosecutor or public defender.

Diversion and Jail Population

Diversion practices can significantly affect jail population and costs under some circumstances including:

- Reduction in jail bookings by introduction of pre-arrest measures, such as adjustment or conciliation of family and neighborhood disputes on the part of the police and prosecutor.
- Diversion of most if not all public inebriates to detoxification centers at the point of arrest.
- Referral by police of minor drug offenders to drug education and treatment agencies - instead of booking them into jail and presenting case to prosecutor.
- Early identification and treatment diversion programs for drug-dependent persons.
- Similar programs for people with serious problems of mental health or mental retardation who may now be cared for, if inadequately, in jails and prisons.
- Expansion of diversion programs which have demonstrated effectiveness with minor first offenders to more serious cases.

Exactly what might be expected in the way of impact on jail population would depend on which of these measures might be adopted, how widely they are

employed, and the effects of prior practices in terms of the number of jail bookings and average daily population. A hypothetical example illustrates the point:

Local Situation*	Unsentenced Bookings		Average Daily Jail Population					
			Unsentenced		Sentenced		Total	
	All Cases	Public Intox.	All Cases	Public Intox.	All Cases	Public Intox.	All Cases	Public Intox.
Current	30,000	7,500	329	82	462	277	791	359
Public Inebriates Eliminated	22,500	-	247	-	185	-	432	
% reduction	25.0		25.0		65.0		45.0	

* Assumptions: (1) All unsentenced bookings spend an average of 4 days in jail before either pretrial release or case disposition. (2) 75% of all cases and 90% of public inebriates are convicted. (3) Of those convicted 25% of all cases are sentenced to jail and 50% of public inebriates. (4) All serve average of 30 days.

Where a jurisdiction's diversion practices are expected to impact on jail population, documentation of actual results should be included in evaluation plans. Doing this would entail developing baseline data - that is, how many persons in the target category are presently in the jail (unsentenced and sentenced) and what do these represent as a percentage of arrests of this category of defendants? After the diversion program has been operative over a period of months, if there is an impact on jail population, the percentage figures should demonstrate this. (Using raw numbers would not be helpful, since the number of arrests might go up or down.)

CHAPTER III

DIVERSION CATEGORIES AND PROGRAM VARIATIONS

To throw additional light on some advantages and disadvantages of differing approaches to diversion, major types of diversion programs are reviewed below, illustrated by practices in several jurisdictions.

A brief review of police diversion practices was included in Chapter II. Another is considered below, in relation to diversion of public inebriates. Other categories of diversion programs reviewed are citizen dispute settlement by the prosecutor in the pre-arrest stage; drunk driver diversion; diversion programs for "vocationally disadvantaged" persons; drug diversion programs; and diversion of less specialized categories.

Citizen Dispute Settlement

A substantial proportion of criminal complaints are related to family and neighborhood quarrels and petty neighborhood crime. The persons involved ordinarily are known to each other. Often they are involved in a relationship which is likely to continue despite an isolated (or chronic) eruption involving assaults, property damage, threats, thefts, or other behavior within the scope of criminal law. Traditional criminal justice procedures and sanctions are impersonal, often clumsy, slow and costly. They are not well designed to resolve crises, settle personal disagreements, or bring about adjustments in the relationships and behavior of people at the family or neighborhood level.

Many of these disputes and differences are amenable to mediation by a disinterested third party. Some of the personal problems contributing to them can be identified and resolved through social, economic, health, or other human services.

One of the most commendable examples of diversion is the practice of deflecting such categories of complaints away from the criminal justice system, while effectively referring the parties involved to sources of intermediation and other appropriate services.

An example of such a program in a police agency was cited in Chapter II (page 35).

Similar programs also operate in prosecution agencies - dealing with complaints which reach the magistrate or are made directly to the prosecutor.

Such a program in Columbus, Ohio, was identified by the LEAA as an "exemplary project." Known as the Night Prosecutor Program, this innovative approach to citizen disputes was begun in the fall of 1971 by the Columbus City Attorney with the cooperation of a local law school.

The kinds of inter-personal criminal charges dealt with include assault, threats, telephone harassment, criminal mischief, and larceny (including since 1973 bad check cases). Referrals may come from complainants directly, from police, city prosecutor's staff, or legal aid. In addition staff selects prospective cases by reviewing the court's summons docket each day. (Since 1973 in Columbus the Clerk of Courts prepares summonses rather than arrest warrants whenever this appears to be appropriate.)

The object of the program is, wherever possible, to resolve the situation occasioning the complaint without resort to criminal processing. At times cases are diverted at an initial screening interview - where complaints may be referred on to the detective bureau, cases may be scheduled for a mediation hearing, or the interviewer may simply refer the complainant to a community social agency.

Mediation hearings are held at night and on Saturdays to facilitate

attendance by employed participants. Actually these are in the nature of group interviews designed to help the parties arrive at a resolution of their differences and achieve reconciliation or, at least, some apparently lasting agreement to live at peace.

In 1974 the program was expanded to include family counseling services. Such help appeared essential in cases where long-standing or deeply rooted conflicts lay behind the complaint, and a mediation hearing could only achieve a brief interruption in hostilities.

Project staff, in 1974, included two attorney-supervisors and thirty-nine part-time law students, who work an average of about five hours a week. The students man two clerk-interviewer positions throughout each evening and four hearing officer positions weekday evenings and on Saturday. Family counseling sessions were conducted two days a week by seven students from a local seminary who have had special training in such work.

In one 12-month period (September, 1972, to September, 1973) 3,626 direct complaints were diverted to the program. About a third of the cases appeared to resolve themselves - the parties did not appear and complaints did not recur. Some 2,200 initial hearings were held - with 100 second hearings because of complaints of non-compliance. It was necessary to refer only 84 cases on for prosecution. Costs for this year totaled $80,300 - about $20 per case diverted. Had all 3,626 cases resulted in arrest and initiation of prosecution, costs per case would have ranged from at least this figure to perhaps thousands of dollars - depending on how far into the court and corrections system the defendant went.[1]

Public Inebriate

In most communities the largest single occasion for adult arrest is public drunkenness (accounting for almost one in five adult arrests nationally in 1974, according to the FBI's Uniform Crime Report for that year).

In many jails public inebriates occupy a majority of the beds - including those awaiting disposition and those serving sentences. Legal views and public opinion in recent years have come increasingly to agreement that alcoholism is akin to, if not actually a disease - and that the public drunk should be regarded as a subject for health and social services rather than the criminal justice system. Decriminalization of this traditional misdemeanor has been voted by a number of state and local legislative bodies.

Where public intoxication is still an offense, diversion is often extensively practiced. This is often unconditional diversion. It may take a combination of forms, including:

1. Delivery of at least some inebriates to a detoxification center (by police) instead of to jail.

2. Release of public inebriates booked into the jail, without prosecution, when they become sober enough or when a third party agrees to assume responsibility for them - usually in a matter of a few hours. In some places (e.g., Charlotte, N.C.) this is done on the basis of an informal agreement with the prosecutor and court. In California, police have statutory authority to release intoxicated persons without referral for prosecution, if they deem this is not necessary or appropriate. Through agreements with arresting agencies, county jailers (sheriff's department) make such release decisions in behalf of the police departments, once the arrestee is booked

into the jail. Typically, arrestees who have not been given such releases more than twice in the past year are processed in this way.[2]

3. Pretrial service agencies (or "ROR" screening units) may ignore the public inebriates - leaving his disposition to the jailer or to the judge at time of first appearance. At times, however, public inebriates may be among persons referred by pretrial service agencies to appropriate community agencies or organizations for care and treatment. Typically, this is incidental to pretrial release, but where such a referral seems to be working out successfully, a recommendation to suspend or drop prosecution may be made - an informal instance of diversion.

Indianapolis Project. An example of the last type of diversion was found in Indianapolis and operates as follows:

Under an agreement with the court and prosecutor, the pretrial services agency screens public inebriation arrestees and refers selected cases to a detoxification center. The agency has authority to order their release for this purpose. Delivery to the center is accomplished by center staff during certain hours of the day, otherwise by police. At the time of the referral, the agency requests a 30-day continuance.

If the individual remains at the center for the standard three-day detoxification period, the pretrial agency so advises the court and district attorney, and prosecution is dropped. If he fails to meet this requirement, the agency notifies him that he is bound to appear in court on the date set in the continuance order. If he fails to do so, a failure to appear arrest warrant is issued.

The agency has tried to select reasonably hopeful cases in this program and appears to have done a good job. In 1975 of 287 referrals to the detox center 243, 85%, completed the three-day program and had their charges dismissed.

Of the 243 a bit over half, 130, acted on detox center referrals to other agencies or organizations for follow-up treatment.[3]

The project, at the outset, ruled out any extensive study of diversion for alcoholics. A few detoxification centers were visited, and data were collected in the jurisdictions involved on the relative use of the detox center vs. arrest and booking. The detox center is only a stop-gap, however, although certainly a quite desirable substitute for the pretrial jail in these cases. A network of further resources are necessary in any concerted effort to deal with the public inebriate.

Prior LEAA-funded studies provided fuller and more expert coverage of this subject area than was possible for us. These studies resulted in two quite useful publications: the final report on the St. Louis Detoxification and Diagnostic Evaluation Center and an LEAA prescriptive package, Diversion of the Public Inebriate from the Criminal Justice System. Also of value is a recent publication of the National Association of Counties on planning and funding programs for alcohol treatment.[4]

Model legislation is another source of guidance for planning in this area. For example, the State of Maine, in 1973, enacted an adaptation of the Uniform Alcoholism and Treatment Act. (Chapter 254, Title 22, Revised Statutes.)

Under this law no laws or ordinances may be enacted in the state providing criminal penalties for drinking, being a common drunkard, or being found in an intoxicated condition.

The Act created a Division of Alcoholism within the State Department of Health and Welfare and charged it with responsibility for planning and developing programs for treatment and prevention of alcoholism and encouraging and assisting private organizations and local units of government also to develop programs. The Division serves as a channel for distribution of federal and state funds

to localities for these purposes -- on the basis of formal plans at the local, regional and state level.

Under the Act, several actions are possible for persons who appear to be intoxicated:

> They may, with their own consent, be assisted home, taken to a hospital, detox center, or other appropriate facility.
>
> If determined to be "incapacitated" by alcohol, they may be taken, without their consent, to an appropriate facility. Such individuals may be detained until no longer incapacitated but not beyond 48 hours.

There are provisions also for voluntary and involuntary commitments for treatment of alcoholism. Involuntary patients may not be held longer than five days without a court hearing. After a hearing, they may be held up to thirty days -- and up to two 90-day extensions can be ordered.

At the same time, persons may not be held under such commitments essentially for custodial purposes. The detaining facility must have appropriate treatment services for them, as certified by the Division.

Drunk Drivers

Arrests for driving under the influence of liquor are second only to public intoxication arrests, nationwide, and exceed these in some jurisdictions.[5]

One diversion program for this offender category was encountered. Unlike other programs referred to in this chapter it is not described in diversion literature. The program operates in Phoenix, Arizona, and was jointly planned by the Municipal Court and City Attorney's office in the wake of legislation mandating a minimum sentence of one day in jail for the first offense of driving under the influence. With 12,000 arrests a year on this charge - and with

the new law giving rise to an enormous increase in demands for trials - a prohibitive volume of work for court and prosecutor's staff began to develop. Moreover a minimum increase in average daily jail population of 25 or 30 appeared inevitable.

The judges believed that various programs being used in Phoenix for convicted drunk drivers were not only much less costly but, in most instances, more effective than jail.

Under the plan which evolved, such arrestees, in the prosecutor's discretion, may be "diverted," so far as the drunk driving charge is concerned. But the individual signs an agreement to plead guilty in a specific courtroom on a named date to a lesser vehicle code charge. The prosecutor also signs and agrees to recommend a specified fine. The defendant further agrees to participate in one or more specified programs related to problems associated with his offense, as developed through an assessment by a "case coordinator." Defense counsel also signs the agreement. If the defendant is not again arrested within the set time period, usually 60 days, and participates in the prescribed program(s), the bargain is carried out in open court, the judge ordinarily accepting the prosecutor's recommendation as to the penalty.

Programs include community college based courses on driving and alcoholism and a range of therapeutic programs for problem drinkers. Generally speaking, defendants finance their own programs through tuition payments or fees.

Failure of the defendant to meet his obligations can result either in reinstatement of the original charge or recommendation of a heavier penalty by the prosecutor if the defendant is still allowed to plead to the lesser offense.[6]

Vocationally Disadvantaged

This type of diversion program was tried initially (1967) in New York City (Court Employment Project) and Washington, D.C. (Project Crossroads). The Vera Institute of Justice sponsored the New York program and the National Committee for Children and Youth the District of Columbia one. The U.S. Department of Labor supplied the funds for operations and subsequent evaluations. The programs gave priority to younger offenders who were, on the whole, poorly educated, unskilled, and chronically unemployed or under-employed. Education, training, job placement and related counseling services were emphasized.[7]

Following initially reported success of these pioneer efforts, the Labor Department funded nine replications across the country, eight for adult offenders and one for juveniles. An extensive evaluation of these was completed during 1974 by ABT Associates of Cambridge, Massachusetts. The findings, very briefly summarized, included these:[8]

- Diversion did not increase the risk of further crime to the community and possibly reduced it in the short run (based on available re-arrest figures).
- A significant number of participants found employment through the project, and a much higher percentage were employed at termination than at intake (58% vs. 33%).
- Overall, the projects did not appear to enhance employment skills notably or to place people in more desirable jobs. That is, almost two-thirds of those employed a year after termination were in minimum-pay jobs.

- Property offenders seemed to benefit more than other categories from this program.
- Defendants who came into the program with fairly good employment records appeared to gain, in other areas of their lives, from counseling services. Those with poor work histories frequently benefited from job and training services but not so much from counseling.
- More could be done to reduce rather high costs of the programs. This would be one effect of some of the program recommendations. Recommendations included:
  - . Reduce extensiveness of screening procedures;
  - . Individualize service plans more, concentrating appropriate services where they are most needed and most likely to produce results;
  - . As a consequence, permit case loads to expand, especially by taking on more needy (and usually more serious) cases;
  - . The programs studied should be seen as one component of a comprehensive set of pretrial release and diversion programs. In too many instances they reflect conditions of fragmentation and unplanned resource allocation in criminal justice;
  - . Consider pre-arrest diversion of these less serious cases rather than proceeding to the arraignment stage;
  - . Strengthen relationships with criminal justice agencies; Consider depending on them to refer cases, rather than continuing to invest in court and jail screening tasks.

Project Intercept - San Jose, California. This was one of the "second round" diversion programs funded initially by a Department of Labor grant. It is operated by a private non-profit corporation, the Foundation for Research and Human Development. It was started in April 1971. First year funding was 100%. The second year Santa Clara County matched a Labor Department grant on a 50-50 basis. Since then the County has continued to fund the program out of federal revenue sharing funds. As this is written (Spring of 1976) the County is considering withdrawal of its support in the face of the possibility of failure of Congress to continue the revenue sharing program (a prospect by no means unique for programs of this sort).

The program serves county residents charged with misdemeanors. Candidates are ordinarily 18 to 26 years of age and usually have no prior adult convictions. The selection criteria favor property offenders who suffer from difficulties in finding or maintaining employment. The criteria were agreed to by the Municipal Court Judges, District Attorney, Public Defender, and the County Board of Supervisors.

Procedures. A project staff member is in court daily and screens persons scheduled for arraignment on misdemeanor charges. In cases where a person meets screening criteria and expresses an interest in the program, the court is requested to grant a 10-day continuance. During this period the agency assesses the candidate as to needs and motivation and acquaints him or her with the program in detail. Where diversion to the agency continues to appear in order, this is recommended in a report which goes to the court, the prosecutor, and the defense attorney. The defendant then, with concurrence of these officials, enters a plea of *nolo contendere*, and the case is set down for three to six months.

Applicants who are finally approved in this manner are assigned to one of the agency counselors. Counselor and participant work out a service plan - goals and related activities and services, primarily in relation to employment or preparation for employment. Services may range widely: assistance with such problems as child care or transportation; placement in a job or in training (49% of all participants); one-to-one tutoring aimed at helping a participant gain a high school equivalency certificate (23% of all participants); referral for services in relation to alcohol or drug dependency, marital conflict, or some other personal problem.

The tutoring program is managed by an educational coordinator and involves use of volunteers - including some present or former participants who had successfully completed the "G.E.D." program. Some participants are practically illiterate at the outset, so that their need is for basic education. About a third of those participating in the tutoring program manage to gain their high school equivalency certificates.

Program Data. During its first three years the project accepted 612 participants, 84% of whom successfully completed and gained dismissal of charges.

A recent study conducted by County Executive staff compared recidivism rates for successful program participants with rates for four other categories of defendants: (1) participants who failed to complete; (2) technically eligible candidates who dropped out or were not finally selected during the 10-day screening period; (3) technically eligible defendants who rejected diversion at the screening interview; (4) a random sample of misdemeanant defendants not meeting eligibility requirements. Random samples of 50 individuals from each of the five groups were followed up for at least eight months and up to twenty.

Program failures had the poorest record of re-arrests (55%), followed by eligibles not selected after in-depth screening (45%). Successful participants (40%) and eligibles who rejected diversion (38%) were closely comparable in recidivism, while the least recidivistic were the ineligibles - by and large older and/or more affluent defendants (33%).

Of special interest is that the subsequent charges incurred by successful program participants were significantly less serious than for any of the other groups. On the average, the 200 defendants in the other four groups incurred 1.3 arrests for felonies and more serious misdemeanors. The successful participants incurred .6 arrests, on the average, on such charges. The great majority of their arrests were for traffic violations, and most of these (35 out of 53) were charged to only three of the 50 participants.

The project has a staff of ten persons: director, secretary, court recruiter, four counselors, job developer, educational coordinator, and clerk. In addition several volunteers are active, primarily as tutors in the "in-house" educational program. Staff size has been held constant as the caseload has increased. Cost per enrollee was running about $650 in 1974 and currently is estimated at $488.

Other. In addition to "divertees," the agency provides job and training placement services, tutoring, and counseling for a miscellany of other clients. These include probationers either referred by their probation officer or granted probation with the condition they report to Project Intercept for services. Also included are some defendants from a minor drug offense diversion program (P.C. 1000) operated by the Adult Probation Department. There are also occasional self-referred clients who have learned of the agency from friends who are participants. The participant caseload, including those in screening

status, was running about 120 in the spring of 1976; an additional 15 to 20 referral clients are usually being served. Counting these, counselor caseloads run about 35 on the average as compared with 25 two years earlier.

Women have been heavily represented among participants, comprising half the new enrollees some months. A bit over half the clients bear Spanish surnames and are predominantly of Mexican descent, with a few Puerto Ricans. Blacks average about 15% of intake and white "Anglos" about 30%.

An interesting program feature - required for new participants during their early weeks - is a "rap session" with representatives of the San Jose Police Department. This has the dual aim of modifying client attitudes toward law and law enforcement and police attitudes toward young offenders. Sessions vary from rather stilted and unproductive to "wide open" discussions which do seem to have learning value for both sides.[9]

Operation de Novo. This is another of the nine "second round" diversion programs initially funded by the U.S. Department of Labor. It is about twice as large as the Intercept program just described. Moreover, in the last few years, with agreement of prosecutor and courts, it has begun to accept participants who were charged with felony offenses.

A fairly detailed account of the history and current operations of this program is presented in another LEAA publication: A Guide to Improved Handling of Misdemeanant Offenders: Prescriptive Package, page 80.[10]

This project has fared better in terms of prospects for survival than may prove to be the case with Project Intercept. Since January 1, 1976, it has been fully funded by Hennepin County under a contractual relationship, and it appears that the arrangement is on a solid footing.[11]

Less Specialized Programs

Dade County, Florida.[12] The Pretrial Intervention program differs in a number of significant ways from most of the Labor Department sponsored programs.

1. It is conducted by a public criminal justice agency rather than a private organization.

2. There is less emphasis on reaching out to people with employment problems and on training and job placement services and more on counseling in relation to personal problems.

3. The program primarily serves persons charged with felonies (85% of intake).

4. Drug law violators and persons dependent on drugs or alcohol are not excluded.

5. It maintains notably close linkage with other county agencies providing services for defendants in the pretrial stage.

6. The diversion agency does not engage in initial screening, candidates being referred by the several components of the criminal justice system.

7. Through various agreements and collaborative arrangements with other agencies diversion procedures have been extended so as to benefit more defendants than the agency could serve directly. Moreover, some participants who are not approved for deferred prosecution are granted "judicial diversion," in the way of suspended judgment following conviction or plea of guilty, on the agency's recommendation.

8. Expungement of the arrest record is emphasized. This is tied in with a one-year follow-up, primarily to collect program evaluation data but occasionally also resulting in provision of further services where these are re-

quested. Persons who successfully complete the program and remain arrest-free for one year following this are reported to the County Director of Public Safety, who has agreed to direct the expungement of the original arrest record in such cases.

The program is one of two directed by Thomas K. Petersen, a former deputy district attorney and public defender. The other program is pretrial release. The latter is one of the sources of referral for diversion. Persons released on recommendation of the pretrial release staff - and then selected for diversion - report only to their diversion program counselor, duplicative responsibility having been eliminated.

This twin agency is housed in the Circuit Court, with the director reporting to the presiding judge in policy matters and the court administrator in relation to fiscal and other administrative matters. Originally, the pretrial diversion agency was housed in the prosecutor's office and pretrial release in the County Department of Corrections.

Although employment-related needs and services are less emphasized than in a number of other diversion programs, this area is in no sense overlooked. A follow-up study in 1975 showed two things: (1) A rather high percentage of participants were students (36%); at the same time about two thirds of the participants were employed (64%), most of them full-time (46%). In the period 3 to 6 months after completion 86% were employed, 58% full-time. Smaller but measurable gains were noted in skill, level of employment, job satisfaction, and length of time on present job.

Priority to Felony Cases. The program is reaching many more felony arrestees than most diversion programs - 1,458 or 12% of all felony arrestees in the County during 1975. Offenses run the gamut, for example: marihuana

possession 20%; other drug offenses 17%; breaking and entering 14%; stolen property 10%; larceny and auto theft 20%; weapons violations 6%.

Ordinarily offenses involving violence exclude a defendant, but 6% of 1975 intake included such offenses as aggravated assault, robbery, resisting arrest, assault and battery, and arson. These may enter the program only when recommended by the prosecutor, victim, and police officer. (In all cases, prosecutor consent is of course required. In addition the arresting officer and victim, if any, are routinely contacted. Usually if there is objection, prosecution is not deferred, although the defendant may be allowed to participate in the diversion agency programs as a volunteer. See below for further discussion. Objections occur, incidentally, in only 3% of the cases.)

Restitution. In relation to victims, the program involves a restitution component - even where guilt is never legally established. Victims are invited to submit claims as to losses in excess of insurance received. The figures are checked against information in the arrest report. Negotiations may lead to reduction in the victim's claim. Restitution is voluntary, but in its absence the victim may register opposition to deferred prosecution. This has happened rarely, and other than the work involved and legal implications, restitution does not seem to affect the program adversely. From an ethical standpoint advantages probably offset disadvantages.

In terms of race and culture, the program appears to serve a cross section of technically eligible arrestees, viz.:

	1975 Enrollees	First Offenders Charged With Non-Violent Crimes in 1975
% Black	35	38
% White (Anglo)	52	48
% Spanish surnames	13	14

Initially, practically all referrals were by the pretrial release agency interviewers, but by 1975 they were the source of only 17% of the participants. Private attorneys and the public defender referred 40%, the police (interestingly) 9%, prosecutor 8%, courts 5%, and others 11%.

1975 Changes. In order to increase program capacity without additional cost or reduced quality of service, two changes were introduced in 1975. Defendants arrested for possession of small amounts of marihuana who do not appear to need supervision or services are not assigned to counselor caseloads. They are monitored only as to subsequent arrests.

The other change was elimination of duplication in cases involving drug dependency. These were regularly referred for treatment service arrangements to the County Comprehensive Drug Program agency. The client then reported both to pretrial intervention and the treatment agency. His performance was monitored by both pretrial intervention and TASC. These cases are no longer charged to pretrial intervention, but continue to have the benefit of deferred prosecution, dismissal of charges, and where qualified expungement of the arrest record. TASC handles the monitoring.

In some cases, because of nature of charge or objections from arresting officer or victim, prosecution is not deferred. If the candidate is otherwise qualified and wishes to take part, he may still be taken into the program. Subsequently the prosecutor may be led to change his mind and arrange for dismissal of the charge through a *nolle prosequi* motion. Or the defendant may be tried and convicted or plead guilty. If he has met program requirements the pretrial intervention agency then recommends that the court suspend judgment and place the defendant on probation, frequently unsupervised and of brief duration.

Staffing/Budget. The project was originally supported by LEAA funds, through the state criminal justice council. Since late 1974 it has been fully funded by the County. The 1975 appropriation was $341,250. (With 925 cases terminated, this represents an average cost of $369 per case; successful completions totaled 735 for an average cost of $464.)

The budget provides for staff housed in the prosecutor's office who handle all of the clerical and secretarial work related to clients identified as eligibles; this is not ordinarily the case with projects not administered by the prosecutor. This point needs to be kept in mind in comparing costs of this program and others.

Staff includes director, administrative assistant, two supervisors, four interviewers, fifteen counselors, and a secretarial staff of six - for a total of 29 persons.

Counselors are comparatively young persons and include a balanced mix of men and women and ethnic groups. Qualifications are flexible, with more attention to interest and personality factors than formal qualifications. Continuing in-service training as well as some external training are provided. A quite detailed manual, with samples of forms and other exhibits, serves to orient and guide the staff.

Evaluations. The program keeps good records and makes every reasonable effort to follow-up on clients for up to a year after termination. Annual statistical reports are published.

Several evaluations have been completed. Two sought to relate program services to recidivism as measured by re-arrest subsequent to participation. The first was done in 1973, the second in 1974. Another such study is to be completed in 1976. The second study was more comprehensive and involved larger numbers than the first. It resulted in a conclusion that program participants

were less frequently re-arrested than members of a control group and that participants who were granted deferred prosecution did better than those diverted by the court after prosecution had run its course. The study has been criticized, chiefly on the basis of control group adequacy. In any event, the results would seem to indicate that diversion did not increase community risk in these cases.

A limited cost-benefit analysis was done. This estimated the costs attached to criminal justice activities, in 797 felony cases, where prosecution goes forward. These totaled $816,192. The diversion agency terminated this number of felony cases in 1975 (plus terminating 128 misdemeanor cases). Program costs were $341,250. Cost of reinstituting prosecution in program failure cases was estimated at $76,608. The program then claimed a net savings of $398,334 to the County, taking only felony cases into account.

Unfortunately the analysis stopped at what is really only an identification of "theoretical savings." It is unlikely that commensurate reductions were made in appropriations for courts, prosecutor, public defender, and corrections. On the other hand, it might have been possible to demonstrate that these agencies met their deadlines and other objectives in the face of increased arrests without added staff - or that court back-logs were reduced or other evidences found that the diversion program had a favorable economic impact on the system.

Mentioned earlier were highlights of a 1975 study of program impact on employment of participants.

Genesee County, Michigan. The Citizens Probation Authority in Flint, Michigan, is one of the oldest formal diversion programs in the country. As in Dade County, it is designed primarily for felony cases, and we understand

that as many as 30% of prospective felony charges are diverted. About half of these, however, are for shoplifting, which in many jurisdictions is usually a misdemeanor.

The program was started as a largely volunteer project in 1965 by Prosecuting Attorney Robert F. Leonard and was originally called the Court of No Record. It aimed at enabling youthful persons (17 to 21) accused of non-violent crimes to avoid the stigma of a criminal record and possible induction into a criminal career. A citizens' committee participated in case selection and in referral of divertees to community agencies when they stood in need of employment, health, social or other services.

The program prospered, but at a modest level, and in 1968 it began to evolve into a professionally operated pretrial probation program. The citizens committee became an advisory board on policy matters.

The original thrust of the program did not change, but selection criteria were liberalized and the number of clients served began to grow.

From the outset the policy has been to identify at the point of the crime complaint or arrest accused persons classifiable as "situational law-breakers" rather than "criminals" (chronic offenders). The selection policy does not rule out a prior record but specifies that the instant offense not constitute part of a continuing pattern of anti-social behavior. So far as practical these people would be handled with minimum prosecutor/court involvement and would be protected from a criminal record. (Record expungement is sought under provisions of a state law - Title 4 - State Affairs, Section 4.463.)

As it became a professional operation, the name was changed to Citizens Probation Authority and the program was assigned to a newly created agency of county government - independent of both prosecutor and court (this at the urging of District Attorney Leonard).

Evaluation. An extensive inter-disciplinary evaluative study was conducted in 1972. Funded by the Michigan Office of Criminal Justice Programs, the study was carried out by faculty members of two universities under coordination of Professor Ellis Perlman of the University of Michigan at Flint.[13]

The study found a very low rate of recidivism among divertees while on probation and during follow-up periods ranging from 27 to 36 months. Less than 1% (0.8) were convicted of felony offenses; 6% of misdemeanors; 7% of traffic offenses. One fourth of the sample experienced arrest, but a preponderance of these were for traffic offenses (11% out of 26%) and only a fifth on felony charges (5% out of 26%).

A further finding was that only 6% of the divertees were cited for probation violation and recommended for further prosecutorial action. The 6% is of cases supervised in a year. Violators made up from 9 to 14% of terminations in the years 1971-1973. In 1974 this dropped to 3%, but violators included only those committing new offenses. A change in policy classified technical violators as voluntary withdrawals; statistically, this lumped them with cases not accepted into the program. An estimate of the number of those indicated a violation per termination rate of 9%, the same as in 1973.[14]

It is interesting that these re-arrest rates are very close to the figures on prior arrests of persons coming into the program; 27% had a prior arrest, 11% as juveniles and 16% as adults. Under intake policies it is unlikely that any had a prior felony conviction or that very many had extensive arrest histories.

Thus the program was dealing, as intended, with a group, most of whom had minimal criminal records and resumed an apparently crime-free life following arrest and diversion. Sixty percent of a sample studied were not referred to community agencies for help. A similar proportion were in school or had

finished at least high school. Only 17% were "economically deprived." The question might be (and has been) raised[15] as to whether the pretrial probation program was not, for many of them, more interventionary and costly than the facts justified. (Program staff would maintain otherwise, pointing to the average of an hour a month of counseling time per case, which means that some cases received and apparently needed much more than this.[16])

The program entails agreement by the defendant to "accept moral responsibility" for the crime; pay a service fee of $100 (unless this is waived because of his circumstances); in some cases (16%) to pay restitution;[17] accept probation supervision for up to a year (average time about seven months); and, become involved in a contractual relationship with the agency to participate in recommended rehabilitative programs or carry out other steps to improve day-to-day functioning.[18]

In return, along with any benefits derived from services, the defendant has a 90% chance of avoiding prosecution and assurance that efforts will be made to expunge his arrest record. (The Perlman study reflected positive feelings toward the program by a large majority of participants.)

Costs. Public costs are modest and possibly canceled by savings. Caseloads are comparatively high, 89 in 1973. (See note 15.) Fees defray about 15% of total program costs and 25% of county general fund expenditures. (Revenue sharing covered 38% of costs in 1974.[19]) In 1971 costs per case were estimated at a low $65.00. This had risen to about $160 in 1974 ($90 of county general funds).

There are at least "theoretical" savings on the part of police, prosecutor, indigent defense, courts, and corrections. How much is saved, however, is difficult to know, since how many of the divertees would be proceeded against

and what would be entailed in the way of court appearances, trials, and final dispositions are speculative matters. Moreover, the savings quite probably are not in fewer dollars spent but in more intensive use of already funded resources.

A Question. It is conceivable - although again speculative - that a substantial proportion of these defendants might have been dismissed by police, prosecutor, or judge with a reprimand and warning and not been "heard from again" by the criminal justice system. In other words, a somewhat elaborate system of screening, supervision, and services has been created to accomplish a purpose which could possibly, in large part, be achieved much more simply and expeditiously. (About 10% of referrals are dismissed without entering the program on the basis of a CPA recommendation to the Prosecutor following initial evaluation.[20])

The Citizens Probation Authority is not unique as an illustration of this phenomenon in criminal justice operations. These, after all, reflect the concrete results of our efforts to reflect, in practice, the conflicting purposes expressed in criminal and penal law and the conflicting influences which affect enforcement policies. If less interventionary practices were emphasized in Flint, it is by no means inconceivable that (1) the pretrial probation program would atrophy and disappear; (2) substantially fewer diversions would take place; (3) criminal justice costs would rise and, at higher cost, neither the community nor defendants would be better served.

Marihuana Cases. In 1972 the program spun off a separate project for youthful marihuana charge arrestees. This operates under the umbrella of the county drug abuse agency. It is similar in nature to the California P.C. 1000 program described below, except that the court is not involved and program

entry occurs within a few days rather than several weeks, as in California.[21]

Before considering other more specialized programs, two other programs, more or less comparable with those in Dade and Genessee Counties, will be briefly reviewed to point up additional variations in organization and practice.

Operation Midway.[22] This program has been in operation in Nassau County, New York, since 1971. It also concentrates on felony defendants. Like Genesee County's, its services and delivery systems are closely comparable to those of a progressive probation program - except that caseloads are kept smaller. Unlike either Genesee or Dade County programs, the service agency is a unit of the county probation department - and referrals are all initiated by defense counsel and require approval of the judge at arraignment. Somewhat like the Dade County program, some cases, despite successful participation, are not dismissed, but the diversion unit's report may result in probation or some lesser disposition at time of sentence.

These arrangements give rise to questions of attention to defendant legal rights (e.g., in relation to release of project information to prosecutor or court in advance of guilt determination). At the same time, with defense counsel involved from the outset and at all decision points, objections may be pretty well anticipated.

San Bernardino County, California. Somewhat similarly a unit of the county probation department in San Bernardino was involved in a pretrial diversion program from the spring of 1973 until March 1976. This differed from Nassau County's in several ways. About two-thirds (68%) of the participants were misdemeanants (71% of all arrests in the County during 1973 were for misdemeanors). The judiciary had no involvement in case selection. As with Genesee County the decision was made at or shortly after the point of arrest by the prosecutor.

A deputy prosecutor screened cases to weed out those not to be filed on and those ineligible because of seriousness of offense or record. Probation staff evaluated the remainder and made a recommendation as to diversion to the prosecutor. He had final authority on this and on subsequent decisions to "no paper" the successful cases and reinstitute proceedings where the client was re-arrested or violated other diversion conditions.

There was no necessary involvement of defense counsel. If an indigent defendant wished advice of counsel before applying for the program, the probation office arranged this. Statistics indicate that practically all defendants did have counsel.

There was no admission of guilt or general requirement of acceptance of moral responsibility for the crime. But in cases involving a victim, restitution, up to the defendant's ability to pay, was an ordinary condition of diversion. No problems were occasioned by this provision and no program violations were based on failure to make restitution.

Caseloads were kept comparatively small (up to 50 cases) and clients were treated differentially as to level of supervision and service. Ordinarily one year was the maximum period of supervision; median stay was nine months.

A quite thorough evaluation was built into this LEAA-funded project. Findings were generally favorable as to low recidivism rates and evident benefits to many clients. At the same time it was not possible to establish cost effectiveness. Lacking a control group, it was difficult to be certain what would have happened to divertees had the program not been available. There is reason to believe, however, that many of them would not have ended up in the formal probation caseloads of the county. In fact, at least for the pro-

bation department, the program generated no savings to offset its costs. In any event, when the LEAA funds ran out, the County Supervisors did not see fit to continue the program out of local funds.[23]

Drug Diversion

In this general category, two rather different classes of defendants can be distinguished: (1) the minor situational offender against drug control laws who, typically, is not dependent on or often even experienced with drugs such as heroin; (2) the person who is dependent on a hard drug and who more often than not is arrested on a charge other than a drug offense and frequently has a record of prior serious convictions.

The diversionary approaches and options differ quite a bit for both categories. Two types of programs illustrate rather "pure" models, illustrating these differences. It should be kept in mind that defendants from either of the two categories, especially minor drug law violators, may be dealt with in either the vocationally oriented or the less specialized diversion programs which have been described. Recall, for example, that minor drug offenders represented a substantial percentage of Dade County diversion cases and that arrangements existed for transfer of drug dependent persons from the pretrial intervention agency to a drug treatment agency.

P.C. 1000. Section 1000 of the California Penal Code, enacted in 1972 and amended in 1975, provides for diversion of persons charged with any of several drug possession offenses and a few other specified offenses indicative of drug use. Excluded from consideration are persons with prior drug offense convictions, those whose current offense involved violence, former parole or

probation violators, former drug offense "divertees," those where evidence indicates trafficking in drugs, and those convicted of a felony within the last five years.[24]

Eligibility screening is by the District Attorney, to determine if the individual appears to meet statutory requirements. If he does, he is offered the opportunity to waive his right to a speedy trial and apply for diversion. Those who apply are referred to the county probation department for suitability screening. Results are reported to the court. None of the investigative findings may be used prosecutorially. The court makes the final selection, in the process assuring itself of the informed and voluntary agreement of the defendant.

For those approved, further criminal proceedings are suspended for a minimum of six months and maximum of two years, with progress reports to the court required at six-month intervals. Participation in some prescribed drug education or treatment program is a standard condition of diversion. A new arrest leading to conviction of a felony or misdemeanor reflecting a "propensity for violence" during the diversion period will result in reinstatement of the original charge, following a court hearing. Satisfactory completion of the drug education or treatment program - in the absence of such a new arrest and conviction - will result in dismissal of charges. Disposition of those not charged and convicted of new crimes but who fail to complete their education or treatment program is left first to the judge's discretion and then to the prosecutor, where the judge refers the cases to him.

Expungement of the record is not provided, but the statute authorizes the successful divertee to deny the arrest with impunity and forbids any use

of the arrest record, without his consent in any way which would deny him "employment, benefit, license, or certificate."

The legislation of which P.C. 1000 was originally a part (S.B. 714, 1972) also included provisions related to drug treatment planning and services at the state and county level and authorized state subsidization of local drug education and treatment programs upon submission of county plans. This ties in with federal legislation providing subsidy funds to states for drug treatment programs.

Impact. This legislation gave rise to a massive, state-wide diversion program (administered at the county level), which has been rather well tracked statistically and subjected to numerous evaluative studies. In 1974 there were 130,000 arrests in the state for all types of drug offenses. Prosecutor filings probably ran about 105,000. Of these some 35,000 were found technically eligible for diversion when screened by the prosecutor, and 30,329 of these were diverted, a sizeable 23% of the arrestees. (In marihuana cases alone, it is estimated that 38% of all filings culminated in diversion.) The state-wide caseload, as of December 31, 1974, was 25,345.

Success of the program, judged by dismissal of charges, has been high - 86% of all terminations during 1973 and 1974. Less than 4% of defendants were removed because of new offenses and only 2% absconded. An additional 8% were reported to the court for failure to complete programs to which they were referred. Most cases are terminated, incidentally, at the time of the first six month review.[25]

Varying Arrangements. Programs differ from county to county. In all counties the probation department handles initial evaluation of referred cases, keeps track of those diverted, and submits reports and recommendations to

the court. In some counties (Alameda, 1975, for example) most if not all divertees receive such drug education and treatment as they get from probation staff. In others, probation staff refer the clients to various community agencies for services - agencies which probation has evaluated and with which it maintains direct contact in each case.

A third pattern was found in Sacramento and San Diego Counties. Probation refers all cases to a county drug treatment agency. The agency determines the nature and level of service appropriate in each case. It may then provide the service directly or arrange for it with (usually private) community agencies, with which purchase of service contracts have been completed. The county drug agency keeps track of clients and makes progress reports to probation, which in turn reports to the court. Obviously, this arrangement results in the lowest costs to the criminal justice system. Total public costs may be more, but this may be associated with higher quality and more expertly evaluated and selected service programs.

In some instances (Santa Clara County, 1975) the divertee pays for his own service. This can result in over-use of the least costly programs, with perhaps more concern for the client's financial circumstances than the nature and depth of his treatment needs.[26]

Evaluation. Several evaluative studies have been done or are in process.

1. A post-program recidivism study is underway by the State Bureau of Criminal Statistics and should be available during the summer of 1976.

2. A cost-effectiveness study was done by Touche Ross, Inc.[27] It points up a fact which had come to our attention earlier - which is that probation department costs were increased by the program. One might think this should not occur - that investigative and supervisory time spent on diversion cases

would be largely offset by reductions in work in the post-trial stage. As it turns out, many of the kinds of cases diverted were not, in the past, heavily represented in pre-sentence investigation and probation caseloads. Either their cases were dismissed; acquittals were gained; or they were fined or given suspended sentences without benefit of a pre-sentence investigation.

3. A comprehensive evaluation was done of the P.C. 1000 program in Orange County during 1974.[28] Findings and conclusions included these:

- Law enforcement officials were less than happy with diversion, since it reduced their opportunities to find out more about drug supply sources from defendants.
- Diversion occurred at approximately the "state average" level - 25% of arrestees.
- The majority of divertees did not abstain from use of marihuana either while in the program or subsequently, although many reported reduced and more circumspect use. (Much more positive results on this point were reported in another study.[29])
- Far from the ideal of early entry, following arrest, into a service program - from eight to twelve weeks elapsed from arrest to court decision to divert.
- In response to a burgeoning workload, the year before diversion (1972) the district attorney introduced changes which substantially reduced processing time in drug offense cases. For example, filings were reduced and most prosecutions were for misdemeanors. In addition, both in 1972 and earlier, courts had rarely requested pre-sentence reports and only occasionally used formal probation in the kinds of cases covered in the diversion statute. As a conse-

quence, diversion made only a limited reduction in prosecutor-court workload, using 1972 as a base year. It greatly increased probation's workload and there was also an increase for the public defender.

- Divertees experienced fewer arrests and convictions, in a comparable time, than similar cases during the two years preceding diversion. Since the percentages of convictions were uniformly low (2%, 5%, and 7%), not too much can be made of this. Still it is not inconsistent with positive sentiments which divertees expressed about the various drug education and treatment programs in which they took part.

The report concluded with the comment that study findings lent support to then current proposals for decriminalization of marihuana possession.

4. In January, 1974, the California State Drug Abuse Prevention Advisory Council issued a report on a survey of facts and opinions of judges, district attorneys, and probation officers on how the new law was being implemented and what changes should be considered. Overall opinion was positive and programs had been implemented in all but two rural counties. The survey elicited a great deal of information and suggestions; these led to drafting of several suggested amendments to P.C. 1000. The legislature did not, however, adopt these, pending further experience with the act and the effects of legislation then in the mill to reduce sanctions on marihuana possession. (A couple were adopted in the 1975 extension of the original act.)[29]

Trends. In many counties cases were more or less dichotomized into "problem free," situational offenders with little or no service needs and persons with multiple problems, including varying levels of drug dependency. The range

in proportion of "problem free" cases reflected quite variant perceptions by probation staff from county to county - e.g., 20% in one county and up to 75% in others. The less troubled cases, in at least one instance, were not referred for or provided services, but only monitored as to the issue of new arrests and convictions. In other counties they were referred to short term, often fairly superficial educational programs, and in one they were involved in community service tasks - doing volunteer work in social and recreational agencies.[30]

Penalties for possessing small amounts of marihuana were reduced as of January 1, 1976 (maximum of $100 fine, which could be forfeited without court appearance, subject to agreement of local authorities). In anticipation of this, marihuana arrests - and diversions- fell off in 1975. After peaking at 3,000 cases a month at the end of 1974, diversions fell to an estimated 1,500 in January 1976. The drop was in marihuana offense cases. Other drug offense cases increased, however, especially in some counties. It appeared in the spring of 1976 that the program, more and more, was beginning to serve people with more serious drug dependency as well as other problems - and that many of the minor marihuana possession cases were either not being cited at all or were opting to pay their fines. In short, with quasi-decriminalization of marihuana possession, the P.C. 1000 program appeared to be moving more toward the objectives of the TASC program, discussed below. Given statutory boundaries and constraints it can only go part way in this direction, however.[31]

- TASC. The emergence of diversion programs in recent years resulted in development of a potentially quite effective approach to case selection, resource mobilization, service referral, and monitoring. The system has application beyond the area of diversion, as will be developed later. The practices

represent key elements in a diversion program for drug-dependent persons which is called TASC (Treatment Alternatives for Street Crime)*

The idea of TASC was to identify, at an early point, arrestees (on any charge) who are dependent on drugs, primarily heroin but also cocaine and prescription drugs. The purpose was to try to engage them immediately following arrest in services which might help them overcome their drug dependency. Faced with the penal consequences of this addiction-related crime, they might be interested - especially if drug treatment is associated with some disposition less than a prison sentence.

The TASC program has not been limited to selecting candidates for pretrial diversion, although this was a chief original goal. It also serves to gain conditional pretrial release for some defendants not selected for diversion - one condition being participation in a drug treatment program. It advocates probation, conditioned on participation in drug treatment, for convicted offenders. In one instance (Dade County, Florida), the program provides drug treatment services for persons confined - for both unsentenced prisoners in the County jail and those serving sentences in a county correctional facility for sentenced misdemeanants.[32]

With exception of the institutional programs just cited, TASC does not provide drug treatment services. Rather, for those approved for diversion, pretrial release, or probation, it arranges for treatment by some existing community agency. It then monitors the service provided as well as the client's performance and keeps the court (or prosecutor or probation department) advised. To the end of the latter purpose it operates an information (tracking) system to show what occurs in the case of each person originally screened until he moves outside the purview of TASC's concerns (imprisoned, discharged, leaves

* Sponsored and presently funded by the LEAA.

jurisidction, etc.). The tracking system serves both in individual case monitoring and in generation of periodic statistical reports for use in evaluating TASC operations, the efficiency of decisions made, and how effectively they are implemented.

In order to have adequate outlets for clients it serves, TASC devotes substantial attention to mobilizing, evaluating, and if need be, helping to generate community resources for rehabilitation of drug-dependent offenders.

The TASC model has been adopted by this project as one which can be applied to arrestees generally - whether involved with drugs or not. (Volume 5.)

Evaluations of TASC programs, with a few exceptions, have been rather favorable. That is, they are found to do a good job of early identification of prospective candidates for drug treatment; have been responsible for increased use of conditional pretrial release, diversion, and/or probation with these offender groups; and have had success in promoting drug-free adjustment and reduced recidivism on the part of an appreciable number of clients. Criticisms of some programs have included failure to screen all arrestees, unnecessarily costly and time consuming screening procedures, failure to develop effective relationships within the criminal justice community, and failure to mobilize sufficient community resources to meet identified treatment needs. One evaluation of five TASC operations concludes with a proposed model program.[33]

Program Development

Because of the range of possibilities for diversion policies and practices, it was not considered feasible to try to present in this publication the kind of specific guidelines, manuals, forms, etc. which were included in Volume 2 in relation to citation and pretrial release. In these three chapters an effort has been made to lay out basic policy issues, variations in program

structure and administrative arrangements, and a broad selection of prospective target groups for diversion. Additional information that may prove useful in diversion program development will be found in Volume 5, which deals with comparative costs of jailing and various alternatives and with organizational arrangements and personnel requirements for a full range of alternative programs.

VOLUME 3 CHAPTER NOTES

Chapter I

1 For a recent critical review of literature on adverse effects of exposure to criminal justice processes ("labeling theory) see DeShane, Blake, and Gibbons, "Background Paper: Juvenile Diversion: Issues and Strategies," Portland, Portland State University, 1975.

For critiques of correctional program effectiveness see:

Lipton, Martinson, and Wilks, "The Effectiveness of Correctional Treatment - A Survey of Treatment Evaluation Studies," Springfield, Praeger, 1975.

Robert Martinson, "What works? Questions and answers about prison reform." The Public Interest, Spring 1974, p. 22.

2 A chief point here is that through use of personal resources for legal assistance, expert witnesses, and to pay for such services as alcohol, drug, or mental health treatment, affluent persons may either win acquittals or arrange for dismissal or suspension of charges in favor of an alternative arrangement such as hospitalization. A formal, publicly financed diversion program will help equalize the enforcement of the law to the extent that indigent defendants benefit from it.

3 National Advisory Commission on Criminal Justice Standards and Goals report, Corrections, Chapter 3.

4 See note 3 and:

National District Attorney's Association, "A Prosecutor's Manual on Screening and Diversion Programs," Chicago, undated.

Roberta Rovner-Pieczenik, "Pretrial Intervention Strategies: An Evaluation of Policy-Related Research and Policy-Maker Perceptions," Washington, D.C., American Bar Association, November 1974, pp. 143-148.

National Pretrial Intervention Center of the ABA Commission on Correctional Facilities and Services, "Pretrial Criminal Justice Intervention Techniques and Action Programs," Washington, D.C., American Bar Association, May 1974.

National Pretrial Intervention Center of the ABA Commission on Correctional Facilities and Services, "Legal Issues and Characteristics of Pretrial Intervention Programs," Washington, D.C., American Bar Association, 1974.

National Pretrial Intervention Center of the ABA Commission on Correctional Facilities and Services, "Source Book in Pretrial Criminal Justice Intervention Techniques and Action Programs, Washington, D.C., American Bar Association, 1974.

Harvey S. Perleman and Peter A. Jaszi, "Legal Issues in Addict Diversion: A Technical Analysis, Washington, D.C., Drug Abuse Council Inc. and ABA Commission in Correctional Facilities and Services, 1975.

Raymond T. Nimmer, "Diversion: The Search for Alternative Forms of Prosecution," Chicago, American Bar Foundation, 1974.

Harlow, Weber, and Cohen, "Diversion from the Criminal Justice System," Rockville, Md., National Institute of Mental Health, 1971. (PHS Pub. #2129).

Joan Mullen, "Pretrial Intervention," Cambridge, Mass., ABT Associates, Inc., July 1974.

Joan Mullen, "Pretrial Services: An Evaluation of Policy-Related Research," Cambridge, Mass., ABT Associates, Inc., December 1974.

"Comparative Evaluation of Five TASC Programs," Bethesda, Md., System Sciences, Inc., June 1974.

Myers, Miller, and Geis, "The Value of Drug Diversion (in Orange County, California)," Santa Ana, Calif., Drug Program Coordination Office, August 1974.

William J. Gorse and Nancy J. Beran, "The Community Criminal Justice System of Lincoln," Columbus, Ohio, Ohio State University, 1973.

New York State Supreme Court, "Diversion from the Criminal Justice Process: An Alternative to Trial and Incarceration," N.Y. State Departmental Committees for Court Administration, Appellate Divisions, First and Second Judicial Departments, 1975.

In addition, the following papers:

Franklin E. Zimring, "Measuring the impact of pretrial diversion from the criminal justice system," University of Chicago Law Review, Winter 1974, p. 224.

Sheldon Portman, "Diversion from the criminal justice system," Paper presented September 25, 1974, to Issues in Justice Seminar by NCCJ in San Jose, Calif.

Jamie S. Gorlick, "Pretrial diversion: The threat of expanding social control," Harvard Civil Rights and Civil Liberties Law Review, Vol., 10, no. 1, 1975, p. 180.

Jacobson and Marshall, "Defender-operated diversion - meeting requirements of the defense function," NLADA Briefcase, June 1975.

Chapter II

1 Pretrial probation program, District Attorney's Office, Albuquerque, New Mexico.

2 Rovner-Pieczenik, "Pretrial Intervention Strategies," Op.cit. supra note 4, Chapter 1.

3 National Pretrial Intervention Center, "Sourcebook in Pretrial Intervention," Op.cit. supra note 4, Chapter 1

4 LEAA has funded a study of the effects of training for police officers in crisis intervention. The report is not yet available as this is written, but preliminary indications are quite favorable. Ann M. Watkins, "Cost Analysis of Correctional Standards: Pretrial Diversion," Washington, D.C., ABA Correctional Economics Center, October 1975, p. 46, note 4.

5 Descriptive material and internal statistical report supplied by Sacramento Police Department.

6 Conflict, March 1975. (Publication of Institute for Mediation and Conflict Resolution, 49 East 68th Street, New York City, 10021.)

7 See Note 1, Chapter II.

8 "Study on Deferred Prosecution" and "Deferred Acceptance of a Guilty Plea," A Prosecutor's Manual on Screening and Diversion Programs, Op.cit. supra note 4, Chapter I.

9 The California Bureau of Criminal Statistics has issued a number of reports on this program over the past two years. One dated August 1975, "Penal Code Section 1000: The Drug Offender Diversion Program," sets forth the law and summarizes data on its implementation state-wide during 1973 and 1974.

10 "The St. Louis Detoxification and Diagnostic Evaluation Center," Project Report, Washington, D.C., LEAA, undated, p. 87.

11 Interview with staff, Citizens Probation Authority, Genesee County, Mich.

12 Op.cit. supra note 4, Chapter I. (Mullen, "Pretrial Intervention" and "Pretrial Services;" and Rovner-Pieczenik, "Pretrial Intervention Strategies.")

Chapter III

1 "Citizen Dispute Settlement: An Exemplary Project," Washington, D.C., LEAA, 1974.

2 California State Penal Code, Section 849 B(2). Practices cited were reported by jail officials in Sacramento and San Diego.

3 Interview with James B. Droege, Director, Pretrial Services Agency of Marion County Municipal Court (Indianapolis).

4 "The St. Louis Detoxification and Diagnostic Evaluation Center," Op.cit supra note 10, Chapter II.

Charles W. Weis, "Diversion of the Public Inebriate from the Criminal Justice System," Washington, D.C., LEAA, September 1973.

Hammer, Benjamin, and Jacobs, "A Practical Manual for County Officials on the Treatment of Alcoholism," Washington, D.C., National Association of Counties Research Foundation, 1975.

5 Nationally, 13.5% of all adult arrests in 1974 were for drunk driving (F.B.I., "Crime in the U.S. - 1974," Table 34, p. 186). In California such arrests totaled 27% of adult arrests in 1973 and exceeded public intoxication arrests in some counties. California Bureau of Criminal Statistics, "Crime and Delinquency in California - 1973," Sacramento, 1974.

6 Information supplied by Presiding Judge Roger A. Galston, Phoenix City Court.

7 National Commission for Children and Youth, "Project Crossroads," New York, 1971; Vera Institute of Justice, "Pretrial Intervention: The Manhattan Court Employment Project," New York, 1972.

8 "Pre-rial Intervention," Op.cit. supra note 4, Chapter I.

9 Discussions with and materials supplied by Richard Ross, Project Intercept Director, San Jose. (Project was also one of those covered in Joan Mullen study, Ibid.)

10 Tully McCrea and Don Gottfredson, "Guide to Improved Handling of Misdemeanant Offenders: Prescriptive Package," Washington, D.C., LEAA, January 1974.

11 Discussions with several Hennepin County officials during site visit in spring 1975, with some subsequent correspondence and phone contacts.

12 Discussions with Director Peterson and staff during site visit, spring 1975. Review of materials supplied by Mr. Peterson, including agency policy and procedure manual, evaluation reports, and agency reports covering 1972-74 and 1975.

13 Except as otherwise noted (or referring to events or data since spring 1972) the factual and statistical material in this section is documented in Ellis Perlman, "Deferred Prosecution and Criminal Justice: Case Study of the Genesee County Citizens Probation Authority," Flint, Mich., University of Michigan, July 1972. (As published in "A Prosecutor's Manual on Screening and Diversion Programs," Op.cit supra note 4, Chapt I.)

14 CPA statistical report for period 1965-1974, supplied by James Wright, Director.

15 Joan Mullen, "Pretrial Services," Op.cit. supra note 4, Chapter VIII, p. 27

16 CPA Counselor Caseload Report, 1973, supplied by Mr. Wright. (Also documented in study identified in note 13 above.)

17 Restitution policies and procedures are set forth in an official statement issued by District Attorney Leonard and entitled Restitution Policy of the Citizens Probation Authority and the Genesee County Prosecuting Attorney.

18 Detailed and illustrated guidelines for use of the contract approach in supervising CPA clients are set forth in an agency memo of September 19, 1974.

19 Figures taken from Genesee County Budget Document for 1974.

20 Taken from statistical report identified in note 14.

21 Program is described in an undated statement by District Attorney Leonard entitled "Genesee County Citizens Drug Diversion Authority."

22 Project staff did not directly study Operation Midway. The description here is based on material in Mullen, Op.cit. supra note 15, p. 28.

23 Based on discussions with the original program director, Dennis Williams, then of San Bernardino County Probation Department, and other staff, and materials supplied by them, including detailed program statistics and a series of evaluation reports.

24 See California Statutes, Penal Code, Section 1000, as amended 1975 session.

25 Statistical report on P.C. 1000 Diversion Program, dated November 1975, issued by State Office of Narcotics and Drug Abuse, Sacramento 95814.

26 California State Office of Narcotics and Drug Abuse, "Education, Treatment, or Rehabilitation: Drug Offender Diversion Programs in California," Sacramento, November 1975.

27 Touche Ross, "Impact Study of Drug Diversion," (Conducted for the State of California Office of Narcotics and Drug Abuse), Sacramento, March 1976.

This study indicated an average cost per diversion of $405 and of successful completions (85% rate) of $477. Processing costs used up the larger share of the expenditures, as the chart following reflects.

	Processing Costs	Supervision & Service Costs	Total
District Attorney	$ 95		$ 95
Public Defender	50		50
Courts	20		20
Probation*	70	$ 70	140
Drug Coordinator & Programs		100	100
TOTAL	$235	$170**	$405

*Breakdown of costs between processing and services as our estimate. The total annual cost per case reported was $280. Since average stay in the program was six months, we reduced this to $140.

**Average daily cost for supervision and services 93¢ -- if probation processing is included $1.12.

The study compared statistics and costs for several agencies in the various counties of the state for the pre-diversion period, 1971-72, with the period 1973-75. Data below were based on findings in 19 larger counties.

Arrests increased by 16%. There is some opinion but no firm documentation of the belief that police made more arrests than they would have in the absence of diversion. Complaints filed -y district attorneys increased 40%, reversing a previous sharp decline in prosecutions for less serious drug law violations. Effects on courts were inconsistent -- with reductions in hearings and costs in some counties, increases in others. One purpose of the legislation was evidently not served -- that is, to "unclog" the calendars of the State's courts. Similar efforts were reported for public defender offices.

The chief impact of the new program, in terms of public service costs, was on county probation departments and, in some counties, on newly established drug treatment coordination offices. Probation departments made 150% more investigations in cases of this type than in the previous period -- when fewer cases were prosecuted and, of those prosecuted, comparatively few resulted in

presentence investigation requests. The same applied to probation department supervision costs. In 1971-72, typically, prosecutions of this type resulted in guilty pleas at arraignment and summary sentencing to a fine and/or suspended sentence. Under diversion, probation departmetns provided services ranging from referral and monitoring to close supervision and special counseling programs. Total probation department costs for this category of case went from $4.6 million per year in 1971-72 to $10.3 million in 1973-75.

As to county drug agencies, in eleven of the nineteen largest counties, $1.3 million in new (state-provided) expenditures were made in connection with P.C. 1000 diversion. (In some counties the probation departments did not make referrals to the drug agencies -- but either provided all services themselves, or made referrals directly to private drug education and treatment programs.)

28 Myers, Miller, and Geis, "Value of Drug Diversion in Orange County, California," Santa Ana, Drug Program Coordination Office, August 26, 1974.

29 California State Drug Abuse Prevention and Advisory Council, "Drug Offender Diversion in California: The First Year of Penal Code 1000," prepared by Robert Berke and Michael Dillard, Sacramento, State of California Health and Welfare Agency, January 1974.

30 "Education, Treatment, or Rehabilitation," Op.cit. supra note 26.

31 Joint Newsletter, California Department of Health and State Office of Narcotics and Drug Abuse, April 1976.

32 Staff interviews, program description and statistical material supplied by staff. Copy of evaluation report submitted by ABT Associates to LEAA January 1975, which found the program to be very well run, but expressed reservations about possible dangers to client civil liberties (issue of confidentiality of information), about lack of sufficient data for sound evaluation, and about the possibility of racial discrimination in dispositions (but was not sufficiently complete to permit interpretation).

(This was one of several TASC programs visited by project staff, and in each instance TASC officials impressed us by their commitment, youthful energy, and knowledge about drug problems. Sites included Indianapolis, Albuquerque, San Diego, and San Jose.)

33 System Sciences, Inc., "Comparative Analysis of Five TASC Programs," Bethesda, Md., June 1974.

Evaluation report on Indianapolis TASC by NCCD Research Center, Davis, California, 1973.

Evaluation reports by three organizations covering 34 TASC programs resulted in favorable findings, according to an LEAA announcement published in the NCCD's Criminal Justice Newsletter of March 1, 1976. The announcement also reported that of eight programs reaching the end of the LEAA support period six are being continued by local governments (Austin, Dayton, Cleveland, Alameda and Marin Counties in California, and Philadelphia).

Fro additional information on TASC programs tbe best single source is Mr. Peter Regner, Narcotics and Drug Abuse Program Coordinator, Office of Regional Operations, LEAA, 633 Indiana Avenue, N.W., Washington, D.C. 20531.

For an informative study of effects of a variety of drug treatment programs, see George Nash, "The Impact of Drug Abuse Treatment Upon Criminality: A Look at 19 Programs," Montclair, N.J., Montclair State College, December 1973.

☆ U. S. GOVERNMENT PRINTING OFFICE : 1977 241-093/2196